81-1891

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite the legislative history of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") and fifty-four years of consistent administrative interpretation by the Department of Labor that has never been disturbed by Congress, the Court of Appeals was correct in including, for the first time by any federal court, employer payments into union trust funds as part of a deceased employee's "average weekly wage" under the Act.

2. Whether the decision of the Court of Appeals should be allowed to stand when it will result in new and endless litigation in the federal courts contesting which contingent interests should now be considered part of a deceased employee's "average weekly wage" under workers' compensation statutes, and how much each of these interests are worth under the particular facts of each case, despite this Court's ruling that one of Congress's principal legislative purposes was to ensure "prompt and certain recovery" for industrial injuries.

3. Whether the true purpose of calculating a worker's wage, at the time of death, for purposes of the LHWCA, is to determine what his or her surviving spouse has lost by reason of the death, rather than simply whether, as the Court of Appeals held, there is something of "value" that can be identified and thus included in the worker's wage, even though the surviving spouse will never qualify for the thing of value.

LIST OF PARTIES *

The parties in case No. 80-1388 before the Court of Appeals were Sonia Hilyer, the widow of James H. Hilyer, as petitioner, and Morrison-Knudsen Construction Company ("Morrison-Knudsen") and Argonaut Insurance Company ("Argonaut") as respondents. The parties in case No. 80-1440 were Morrison-Knudsen and Argonaut as petitioners and Mrs. Hilyer as the respondent. The parties in case No. 80-1504 were the Director of the Office of Workers' Compensation of the United States Department of Labor as the petitioner and Morrison-Knudsen and Argonaut as respondents.

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* Petitioner, Morrison-Knudsen Construction Company, reports, pursuant to Rule 28.1 of the Rules of this Court, that Morrison-Knudsen Company, Inc., is the parent company with subsidiary companies which are all wholly-owned. Affiliate companies not wholly-owned include: Accurate Manufacturing Company, Internacional de Engenharia S. A. (IESA), Moore Financial Group Inc., George E. Madding Company, Inc., and Westmoreland Resources, Inc.

Argonaut Insurance Company is a wholly-owned subsidiary of Teledyne Financial Corporation, which is a wholly-owned subsidiary of Teledyne, Inc. The following is a list of companies which are not wholly-owned subsidiaries of Teledyne, Inc., or its subsidiaries, but which may be deemed to be affiliates: Brockway Glass Company, Curtis-Wright Corporation, Litton Industries, Inc., Riechhold Chemical Company, Teledyne Canada Limited, and Unicoa Corporation.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Morrison-Knudsen Construction Co. ("Morrison-Knudsen") and Argonaut Insurance Company ("Argonaut") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which included employer payments into union trust funds as part of a deceased employee's compensation due under the Longshoremen's and Harbor Workmen's Compensation Act, 33 U.S.C. §§ 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501 *et seq.*

OPINIONS BELOW

The decision and order of the Administrative Law Judge (No. 76-DCWC-158) issued September 7, 1976, is not reported but appears as Appendix H (App. 36a) hereto. The order of the Benefits Review Board (Nos. 76-410, 410A) dated November 30, 1977, is reported at 6 B.R.B.S. 754 and appears as Appendix G (App. 28a) hereto. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (Nos. 77-2076, 78-1087) filed July 19, 1978, is not reported but appears as Appendix F (App. 27a) hereto. The decision and order on remand of the Administrative Law Judge (No. 76-DCWC-158) dated October 5, 1978, is not reported but appears as Appendix E (App. 23a) hereto. The order of the Benefits Review Board (No. 78-568) dated March 19, 1980, is reported at 12 B.R.B.S. 87 and appears as Appendix D (App. 17a) hereto. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Nos. 80-1388, 80-1440, 80-1504), from which certiorari is sought, dated November 1, 1981, is reported 670 F.2d 208 and appears as Appendix C (App. 4a) hereto. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc, dated January 14, 1982, are not reported but appear as Appendices A and B (App. 1a, 3a) hereto.

JURISDICTION

The Court of Appeals' decision in these cases was rendered on December 1, 1981 (App. 4a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on December 15, 1981, and denied on January 14, 1982 (App. 1a, 3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix I (App. 50a) hereto.

STATEMENT OF THE CASE

These are three cases—all involving the same claimant and the same legal issues—which were consolidated on appeal in the United States Court of Appeals for the District of Columbia Circuit.

All three cases arose from the death of one James H. Hilyer during the course of his employment with petitioner Morrison-Knudsen Construction Company ("Morrison-Knudsen"). At the time of his death, Hilyer was covered by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501, 502 (1973), which in turn incorporated the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976) ("LHWCA") (App. 50a).[1]

Under Section 9(e) of the LHWCA (see App. 52a), death benefits are computed by reference to the "average weekly wage" of the deceased employee on an annualized basis. However, since Hilyer had been working for Morrison-Knudsen for only five months prior to his death, the Administrative Law Judge, pursuant to Section 10 (b) and (d) of the Act (see App. 53a-54a), correctly determined Hilyer's average weekly wage by reference to the average *yearly* wages of a fellow employee whose compensation could most closely be compared to that of Hilyer.

At the time of his death, Hilyer had been a member of Local 456 of the Laborers' District Council of Washington, D.C., and Vicinity—an affiliate of the AFL-CIO. The collective bargaining agreement between that union and Hilyer's employer required, among other things, that the employer pay certain sums of money into three

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[1] Although a new District of Columbia statute will soon become law, it contains the same definition of wages interpreted by the court below. 36 D.C. Code § 301(19) (1981). Moreover, the definition espoused by the court was of the LHWCA, which of course has wider application than in the District.

union trust funds for each hour worked by each employee—namely, 28 cents into a health and welfare fund, 35 cents into a pension fund, and 5 cents into a training fund. Hilyer's widow, respondent Mrs. Hilyer, argued before the Administrative Law Judge that these payments to the union trust funds should be included in the determination of her husband's "average weekly wages" for the purpose of calculating the death benefits to be paid to her by Morrison-Knudsen. Following an unbroken tradition going back 49 years since the LHWCA had first been passed in 1927, the Administrative Law Judge rejected her contention (App. 36a), and the Benefits Review Board upheld his ruling (App. 28a).[2]

In so ruling, the Board noted previous Board authority to the effect that contributions by an employer to a health and welfare fund and a pension fund should not be included in the average weekly wage, and also found that this record did not reflect whether decedent's rights in the pension had even vested. The Board observed that "inclusion of the contributions to the pension fund reflects a belief that the employee would also continue to work for employer and build up his pension" (App. 32a), that the health and welfare fund was "contingent on an illness occurring" (*id.*), and that the actual value of the health and welfare program was "dependent on their [the family's] possible use of it" (App. 33a). The Board further noted that amounts contributed by the employer would "in all likelihood not buy decedent's family similar kinds of protection" (*id.*), and that the value of the training program was "highly speculative" (*id.*). The Board concluded:

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[2] The case was remanded for a reconsideration of attorneys' fees. A new opinion was rendered dealing with this issue (App. E), which was reviewed and modified by the Benefits Review Board (App. D). Although that issue was addressed by the Court of Appeals (App. 14a-16a), it is not before this Court for review.

> Therefore, it is clear that in this case that an employee's right to these funds and the actual value of them to the injured employee is highly speculative. [*Id.*]

Mrs. Hilyer appealed this ruling to the United States Court of Appeals for the District of Columbia Circuit, which reversed and held for the first time by any federal court that because the payments to the union funds were "readily identifiable and calculable", and were of substantial economic benefit to the employee, the payments were part of Hilyer's "average weekly wage" (App. 4a). In so ruling, the court purported to interpret "wages", which is defined as follows in Section 2(13) of the LHWCA, 33 U.S.C. § 902(13):

> (13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Both Morrison-Knudsen and its insurer, petitioner Argonaut Insurance Company ("Argonaut"), opposed the definition of "wages" adopted by the Court of Appeals before the Administrative Law Judge, the Benefits Review Board and the Court of Appeals, and all three bodies specifically ruled upon the issues raised in this Petition (App. 8a-14a, 31a-33a, 46a).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to pass upon the Court of Appeals' interpretation of Section 2(13) of the LHWCA, as extended by the District of Columbia Workmen's Compensation Act.

ARGUMENT

At first blush, the decision below might appear to be an ordinary and narrow one of statutory construction in which the Court of Appeals simply adopted one of two equally permissible views of what the LHWCA means. In point of fact, however, the court has reached a result which, if not reversed, will have the most extraordinary and far-reaching consequences, literally putting some concerns out of business.

Moreover, the opinion below is wrong. It directly contradicts Congressional intent, as well as the consistent administrative interpretation of the Act by the Department of Labor ever since the Act's passage, it defeats this Court's admonition that industrial injuries must result in "prompt and certain recovery". If left unchanged, it will result in a tide of new cases in the federal courts as employers and employees (or their representatives) litigate over what contingent interests should or should not be part of "wages" and what value to place on each, and it ignores the basic purpose of the Act, which is to compensate survivors for what they have lost by reason of the employee's death.

A. Impact of the Decision Below

One trade journal has estimated that the cost of workers compensation claims could increase in the District of Columbia by as much as 50% as a result of the ruling below.[3] However, the ruling will have an impact far beyond the confines of the District—and already has begun to do so. Survivors of deceased employees in other jurisdictions have begun to seek benefits similar to those accorded Hilyer's widow by the court below, and the result is that insurers, self-insurers, employers and the Department of Labor are all in a quandary as to how to proceed.

For example, must insurers now set new rates and premiums, while at the same time increasing their re-

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[3] "Business Insurance", February 8, 1982, p. 1.

serves? And, if so, how do they go about estimating the costs of the various benefits which hereafter may be included as wages? The decision below makes it virtually impossible for insurers to price their products. At the very least, there will be numerous and lengthy rate filings before insurance commissioners. Even if the decision below is only applied prospectively, costs will soar, and an ever restrictive insurance market will become even more restrictive.

There is also the specter that the decision may be applied retroactively. In that case, insurers will be forced to pay benefits for which no premiums have been collected. This will force insurers to pay losses out of reserves and could affect their ability to provide workers compensation insurance at all. One can hardly imagine the chaos that would result from reopening many thousands of old claims where contingent interests had never been claimed or their value calculated.

As to self-insurers, how can they possibly contend with this new development, with workers compensation costs already at staggering proportions? For example, LHWCA costs in the New York harbor are already 86% of payroll. It is no exaggeration to state that the decision below could boost workers compensation premiums *above* payroll. Not only do such self-insurers have most of the insurer problems noted above, but they also would have to post additional surety in order to remain qualified under Department of Labor regulations. Many of them could not do this. Moreover, although the LHWCA was intended to be uniform, different classes of self-insureds' employees almost certainly would receive different and disparate treatment under the Act, since contingent interests will vary.

What records must be maintained by employers to be able to substantiate weekly wages? Record-keeping and computer time will become far more costly.

And, finally, must the Department of Labor, which has the statutory obligation to calculate the "national average weekly wage" under 33 U.S.C. §§ 902(19), 906(b)(1), and which has *never* included the type of benefits mandated by the Court of Appeals, now re-evaluate and recalculate its computation in disability cases? This would be a virtually impossible task even if the Act is applied only prospectively, but it would become a nightmare of unreality if the decision were applied retroactively.

Moreover, one could argue—as unions and claimants undoubtedly will—that if the decision below makes sense as to the LHWCA, it makes equally good sense as to other statutes such as the Federal Employees Compensation Act, and those acts governing temporary disability insurance, unemployment compensation, Social Security, and state workers' compensation programs, which include language essentially the same as LHWCA. If an employer's contributions to all of these programs were to be included in each employee's average wage, the increased costs would reach truly astronomical proportions. The decision below will have the anomalous result, not only of discriminating against employees who do not have funds paid by their employers but of causing *double* payments to be made on behalf of union employees—first to the union funds before the injury and then to the surviving spouses thereafter.

As noted in the trade journal referred to above (n.3, *supra*), "* * * more workers compensation cases will end up in the courts as employers and employees battle over the value of benefits, experts say." But it is not only the *value* of benefits that will be litigated. The already overburdened federal courts will also repeatedly be asked to decide *which* benefits in regard to *which* employees under *which* statutes should be accorded the status of the union trust fund payments dealt with in the opinion below. This is particularly true in view of the fact that attorneys' fees are awarded if workers compensation is in-

creased over and above what employers agree to pay, so that there will be an incentive for attorneys to seek to have as many contingent interests as possible included in awards.

We are addressing an Act with extraordinary coverage. At the time Congress was considering the 1972 amendments to the LHWCA, a Senate subcommittee estimated that approximately 800,000 employees were covered by the Act and its extensions (including the District of Columbia). Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, Committee Print, 92nd Cong., 2nd Sess. (1972), forward page. The Department of Labor estimates that by last year this figure had risen to approximately 905,000. In its most recent budget submission to the Congress, the Department reported 251,000 persons injured under the Act during 1981, of which 61,000 actually lost time from their work because of those injuries. The Department projected similar figures for 1982 of 253,000 and 67,000, and for 1983 of 270,000 and 73,000. Thus, not only are the figures themselves imposing, but they are increasing annually. United States Department of Labor, 1983 Budget Justification of Appropriations Estimates for the Committee on Appropriations (January 1982), ESA-33, Table II of Longshoremen's and Harbor Workers Compensation Act Workload Statistics FY1981-FY1983.

B. The Decision Below Was Erroneous

Because of the extraordinary impact of the Court of Appeals decision upon so many thousands of employees, employers and insurers, as well as the Department of Labor, that decision would warrant plenary review by this Court even if the result reached were a correct one. The fact is, however, that the decision is demonstrably wrong—for a number of reasons.

1. ***The Court's Interpretation of the Act Flies in the Face of the Legislative History.***

LHWCA, passed in 1927, was almost a verbatim copy of an Act then in existence in New York. 1922 N.Y. Laws, ch. 615. Without exception, the addition of union trust fund payments to the concept of wages had *never* been asserted, attempted or accomplished under the New York statute. On the contrary, the New York statute was uniformly interpreted to equate wages with cash or its equivalent paid directly to the worker. That was the interpretation which Congress understood at the time it passed the LHWCA, and it was the one which has prevailed ever since—until the entirely new concept developed for the first time by a federal court in the opinion below.

It is highly significant that Congress has modified various aspects of the LHWCA since its passage in 1927—including a far-reaching overhaul in 1972—but has never seen fit to change the original definition of "wages" in 33 U.S.C. § 902(13). The importance of this is pointed up in *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268 (1980) (*"Pepco"*). The issue there was whether a permanently partially disabled employee could elect to receive the larger of two recoveries set forth in the LHWCA. The Court held that while Congress could certainly have authorized such an election, it had not done so. Despite the need to construe the Act so as to conform to its humanitarian objectives, and despite a recent trend in workers compensation law away from the idea of exclusivity of scheduled benefits, the "plain language" of the Act as construed at the time the LHWCA was adopted was held to prevail. *Id.* at 273, 276. In the instant case, there has not even been a "recent trend" toward to the Court of Appeals' interpretation, as there was in *Pepco*.[4]

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[4] LS/HW Program Memorandum No. 32 of the Bureau of Employees' Compensation, Wage and Labor Standards Administration, United States Department of Labor, issued on June 17, 1968,

This Court in *Pepco* laid particular stress upon the interpretation accorded the New York statute after which the LHWCA was patterned, at the time the LHWCA was adopted. There, as in the instant case, New York case law supported the "plain language" approach. In addition, this Court pointed out that the LHWCA was never intended to provide "complete compensation for the wage earner's economic loss." *Id.* at 281.[5] Rather, the purpose was to have "definite" limits, assuring a "prompt and certain recovery". *Id.* at 281, 282. In this case, nothing could assure less definite limits and a less prompt

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directly considered the issue of whether contributions to union funds such as those involved in the instant case should be included in computing the average weekly wage. Significantly, the Memorandum incorporated the text of an Associate Solicitor's Advisory opinion and concluded that "'* * * we feel bound by [the] past practice of excluding these fringe benefit contributions from wages * * *'", and that if any change was to be made, "'* * * it is up to Congress * * *'" (p. 3).

[5] One of the reasons why it was never intended for compensation payments to equal actual loss was to prevent malingering. See 1 Larson, *Workmen's Compensation Law* § 2.50, pp. 11-12 (1964).

An example of how this would occur results from the current collective bargaining agreement governing work by members of the International Longshoremen's Association in the Atlantic and Gulf Coast ports. This agreement, which is midway through its three-year term, currently provides for a $12.80 basic hourly wage, plus $4.59 per hour of work to be paid into pension, health and welfare funds. (Locally negotiated contingent interests and contingent interests required by law are extra.)

Assuming a 40-hour work week, the longshoreman's actual wages would be $512.00. In the case of total disability under the LHWCA, the compensation rate (at 66 2/3%) would be $341.32. However, if the contract fringe benefits were to be included in the computation, the base upon which the compensation rate would be applied rises to $695.60 and would yield a weekly compensation rate of $463.72, or nearly 90% of actual pre-injury wages, tax-free. This would yield a post-injury income of about $24,100 per year, or about $3,900 *more* than the pre-injury spendable income (gross wage minus Federal and State taxes and FICA) of $20,200. Thus, any economic incentive to return to work would be eliminated.

and certain recovery than the interpretation of "wages" advanced by the Court of Appeals.

2. *The Decision Below Violates the Plain Language of the Statute.*

Here, the relevant definition of "wages" is clear. The key words are "money rate". The special payments listed by the statute—board, rent, housing, lodging and gratuities—have two key features in common. They are paid directly and unconditionally to the employee, and they have a clear and present cash value. The same is true of other payments that have been recognized as coming within the phrase, "similar advantage"—namely, transportation, overtime and vacation pay. By contrast, payments into a union fund are not paid to the worker, and at no time can he or she demand their value in cash.

It is important to recognize that when Congress wishes to include union fund contributions in the concept of "wages", it is fully cognizant of how to accomplish the task. Thus, in the Davis-Bacon Act, as amended, 40 U.S.C. § 276a (1976), the definition of "wages" expressly includes all contributions by employers into union trust funds (App. 54a). No such language appears in the "wages" definition in LHWCA. This could hardly have been an oversight. "Board" and "rent", for example, are dwarfed in significance by union-fund payments that could double wage figures, and yet "board" and "rent" were specifically spelled out in the LHWCA definition of "wages" (App. 50a).

There is a clear dichotomy between, on the one hand, what is paid directly to a worker, is tangible, and is convertible to cash, and, on the other hand, those contingent interests which do not fit any of these categories. A contingency in a union fund resulting from payments directly to that fund is of the latter type.

Here, the record showed that Hilyer had no right to tell his union how to use the funds (App. I-60).[6] As a

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[6] The citation here is to the record before the Court of Appeals.

matter of fact, there is no evidence that before his death he even had a vested interest in the funds or that he had ever received any pension, insurance, disability or health payments, or any training, under any of the three funds.

3. *The Decision Below Completely Disregards the Specific Purpose of the Concept of "Wage" in a Compensation Statute.*

The central fallacy in the opinion below is that it attempts to interpret "wages" in the abstract. It declares the sole issue to be whether the contingent interest is a "value" that is "readily identifiable and calculable." It then works those words over as if it were writing a dictionary instead of a working rule in a total system designed for a definite practical purpose. What the court should have done was to realize that the purpose of calculating the worker's wage before his death is to determine *what his or her spouse has in fact lost by reason of the death*, in terms of what the family was accustomed to rely on to maintain its standard of living. Unlike most other social insurance systems, that pay flat-rate benefits, the American system has always attempted to key the benefit to past wages. The reason is not some notion that there is a legal right to a precise mathematical counterpart to some pre-injury "values", whether identifiable and calculable or not.[7] The reason is that at the time of injury or death, the family was living at a certain level represented by average wage, and the cash income benefit should be keyed to that wage on which the family actually lived.

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[7] Even when the exact value of so-called "fringe benefits" which have actually been paid to the worker have been established on the record, these monies have been held not to be earnings within the meaning of Section 10 of the LHCWA. For example, in *Strand* v. *Hansen Seaway Service, Ltd.*, 614 F.2d 572 (1980), the Seventh Circuit Court of Appeals held that longshoremen's off-season state unemployment benefits were not part of their annual earnings for the purpose of determining their disability benefits.

Obviously, some tangible non-wage payments must also be included, such as board and room, and this statute expressly includes them, since these are indeed part of the standard of living and are indeed lost by the death or injury. But as to contingent interests, the fallacy is that they are not a value that, first, form part of the standard of living, and, second and more importantly, are not in any meaningful sense lost as the result of the death or injury.

To sharpen this point, postulate that the contingent interest in question is group life insurance—a very common type of fringe benefit. The worker is killed. In terms specifically of that contingent interest, what has the surviving spouse lost? Nothing. To the contrary, he or she has gained the face value of the life insurance. The same analysis can be repeated for almost all contingent interests. Cessation of payments into union pension funds means nothing, because the deceased will never qualify for a pension. Cessation of payments for training is equally meaningless. If these contingent interests are "wage", then why not the employer's contribution to Social Security?—a move that would dramatically increase the wage basis. The answer, again, is that by the deceased's death the surviving spouse, far from losing a "value", gains the survivor's benefits of the system. Why not Unemployment Insurance premiums? Again, nothing is lost. To reduce the whole matter to absurdity, one need only adduce another common contingent interest—supplementary workers' compensation. The death or injury of the worker here actually confers the benefit that the premium payments only anticipated. If one adds to the face value of the supplemental compensation the value also of the insurance premiums used to purchase that supplemental compensation, one ends with the most preposterous kind of double payment.

4. ***The Decision Below Conflicts with A Consistent Administrative Interpretation.***

For 70 years—even before the LHWCA became law—the Department of Labor has been interpreting wages in workers compensation statutes, and without exception it has done so in a way that excluded payments to union funds. In particular, the Department must calculate the national average weekly wage, and, in doing so, it has never in its history included the types of contingent interests included as wages by the court below.[8] Surely, great weight should be given to this uninterrupted statutory construction by the Department with the most expertise in dealing with the Act. *United States* v. *Rutherford*, 442 U.S. 544, 553-554 (1979); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 302-304 (1977); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

"Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford, supra*, 442 U.S. at 554. If Congress had thought, during the several instances when it addressed itself to necessary changes in the LHWCA, that both the Department of Labor and the

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[8] One of the reasons the Department has not done so—in addition to the fact that assessing their value would be virtually impossible—is that the Department's calculations are based on wages taxable to the worker. See *Monthly Labor Review*, United States Department of Labor, Bureau of Labor Statistics March 1982, p. 64. The contingent interests dealt with in the instant cases are not reported on the worker's W-2 statements, nor are they taxable to the worker until he or she actually receives a specific benefit, such as a pension from a trust fund. It would be anomalous, to say the least, if such contingent interests were included in the individual worker's average weekly wage under the LHWCA when determining disability benefit levels, but they were not included in the determination of the national average weekly wage which defines the limitation for benefits under the Act.

Benefits Review Board [9] had been leaving out of "wages," as well as benefits awarded to the spouses of deceased workers, as important an element as payments to union funds, Congress certainly would have amended the Act in order to correct the error. It has never done so. Instead, the Court of Appeals has amended the Act by judicial fiat—a power it does not have. *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200 (1951).

5. ***The Decision Below Is Incapable of Administration.***

We have shown above the adverse impact of the decision below upon insurers, self-insureds, employers, the Department of Labor, and the federal courts. But there is a further reason why the decision is simply incapable of administration. While it is true, as the Court of Appeals noted, that payments into the union funds are "calculable" [10] in the sense that the union contract spelled out the payments to be made based on each *hour* of work, it is not each hour of work that determines benefits under the Act. Benefits are based on "average annual earnings," 33 U.S.C. § 910(a) (b) (c) (App. 53a). We do not even know—and cannot know—how many hours Hilyer would have worked during a full year because he was employed by Morrison-Knudsen for only five months. While it is one thing to use a "comparable" employee for the purpose of calculating annualized wages under the Act, it is quite another to assume that the union funds

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[9] Prior decisions of the Benefits Review Board have repeatedly held, contrary to the lower court's opinion, that union benefits are not includable in the employee's average weekly wage. *Hilyer* v. *Morrison-Knudsen Construction Co.*, 6 B.R.B.S. 754, 758 (1977); *Lawson* v. *Atlantic & Gulf Grain Stevedores Co.*, 6 B.R.B.S. 770 (1977); *Collins* v. *Todd Shipyards Corp.*, 5 B.R.B.S. 334 (1977); *Freer* v. *Duncanson-Harrelson Co.*, 9 B.R.B.S. 888 (1979); *Waters & Levis* v. *Farmers Export Co.*, Nos. 79-329A and 79-330A, decided 6/12/81, appeal pending 5th Cir., Nos. 81-4258 and 81-4273.

[10] Of course, everything that is "calculable" is not a fringe benefit. See, *e.g.*, *Trinity Services, Inc.* v. *Marshall*, 593 F.2d 1250 (D.C. Cir. 1978). See also n.7, *supra*.

would have vested and that the two employees would have had the exact same payments made to those funds, based on their individual hours of work. Certainly those who must calculate payments in advance for purposes of, for example, setting insurance premiums and reserves, will find that task impossible.

CONCLUSION

To announce a totally new interpretation of a vital and yet common phrase in a workers' compensation statute after 70 years of administration of the Act is, to say the least, judicially presumptuous. But worse still is that what was before a relatively certain and prompt method of payment to claimants will now result in turmoil, uncertainty, delay and endless litigation, unless this Court reverses the result below. We respectfully urge the Court to do so.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1388

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

And Consolidated Cases

Argued 3-19-81

Filed Jan. 14, 1982

Before: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Respondents/cross-petitioners' suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon, Wilkey and Ginsburg would grant rehearing *en banc*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1388

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

And Consolidated Cases

Argued 3-19-81

Filed Jan. 14, 1982

Before: Robinson, Chief Judge, Robb, Circuit Judge and Luther M. Swygert *, Circuit Judge, United States Court of Appeals for the Seventh Circuit

ORDER

On consideration of respondents/cross-petitioners' petition for rehearing, filed December 15, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1388

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

No. 80-1440

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Petitioners

v.

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Respondent

No. 80-1504

DIRECTOR, OFFICE OF WORKERS' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

Petitions for Review of Orders of the
Benefits Review Board

Argued March 19, 1981

Decided December 1, 1981

Catherine A. Giacona, Attorney, Department of Labor, for Director, Office of Workers' Compensation Programs, Department of Labor, petitioner in No. 80-1504. *Joshua T. Gillelan, II*, Attorney, Department of Labor, also entered an appearance for Director, Office of Workers' Compensation Programs, Department of Labor.

Richard W. Galiher, Jr. for Morrison-Knudsen Construction Company, et al., petitioners in No. 80-1440 and respondents in No. 80-1504.

George S. Leonard for Sonia Hilyer, cross-respondent in No. 80-1440 and petitioner in No. 80-1388.

Before: ROBINSON, *Chief Judge*, SWYGERT,* *Senior Judge*, and ROBB, *Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SWYGERT.

SWYGERT, *Senior Circuit Judge*: In these consolidated appeals we are asked to review a final order of the Benefits Review Board of the United States Department of Labor. The case presents a question of first impression concerning construction of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501, 502 (1973) ("the Act" or "the Longshoremen's Act").

The claimant in this case is Sonia Hilyer. On April 19, 1974 her husband, James H. Hilyer, was

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* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. 291(a).

fatally injured during the course of his employment with respondent Morrison-Knudsen Company.[1] At the time of his death, Hilyer was a member of Local 456 of the Laborers' District Council of Washington, D.C. and Vicinity, an AFL-CIO affiliate. In addition to the covered employees' hourly rates of pay, the collective bargaining agreement between the union and Morrison-Knudsen provided that the company would pay fixed sums of money into three union trust funds. Specifically, the company agreed to pay twenty-eight cents into the health and welfare fund, thirty-five cents into the pension fund, and five cents into the training fund, for each hour that each employee worked.

Morrison-Knudsen began paying death benefits under the Act to the claimant immediately upon her husband's death. A dispute arose, however, over the amount of benefits to which she was entitled. Hilyer had been employed by Morrison-Knudsen for only five months when he died. During the year before his death, he had also been employed as a security guard and a grocery clerk, at substantially lower wages. In figuring his average weekly wage, the company took into account his prior employment. The claimant contended that her husband's average weekly wage should be based only on his employment with Morrison-Knudsen. She also contended that the company's contributions to the three union trust funds should be included as part of her husband's "average weekly wage" under the Act.[2]

Following a hearing, an administrative law judge agreed with the claimant that the average weekly wage should reflect only the deceased's earnings as a construction worker for Morrison-Knudsen. Accordingly, pursuant

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[1] Morrison-Knudsen's insurer, the Argonaut Insurance Company, is also a respondent here.

[2] Under section 9 of the Act, death benefits are computed by reference to the average weekly wage of the deceased employee.

to section 10(b) of the Act, the average weekly wage was determined by reference to the average yearly wages of a fellow employee whose wages most closely resembled those of the deceased during the period he worked for Morrison-Knudsen.[3] The administrative law judge further ruled, however, that the contributions to the union trust funds were not includable in the average weekly wage. At the hearing, the claimant also presented a claim for attorney's fees pursuant to section 928 of the Act. Although she requested $7,530, the administrative law judge awarded a fee of $2,988.80.

On cross-appeals to the Benefits Review Board, the Board upheld the administrative law judge's ruling with respect to the amount of benefits to which the claimant was entitled. The Board rejected the company's contention that section 10(b) should not be applied, and also rejected the claimants' contention that fringe benefit payments should have been included in the average weekly wage. The Board remanded the case, however, ordering that the administrative law judge give detailed reasons for the substantial reduction of the attorney's fee award.

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[3] The relevant statutory language of section 10(b) reads:

Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

* * *

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

On remand, the case was assigned to a different administrative law judge.[4] The new administrative law judge increased the attorney's fee award to $4,000. The claimant again appealed to the Board, contending that the award was still inadequate. The Board modified the fee award to $6,215. Both parties thereafter petitioned this court for review of the Board's order. The claimant contends that the Board should have included the employer's trust fund contributions in computing her husband's average weekly wage; the company contends that the Board's modification of the attorney's fee award was clearly erroneous.

I

We address first the claimant's contention that the fringe benefits provided to her husband by means of the company's contributions to the union trust funds are a part of her husband's "average weekly wage" within the meaning of the Act. This issue has apparently not been addressed before. We begin our analysis with the specific language of the statute.

The term "wages" is defined at section 2(13) of the Act:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13). We agree with the Board that this definition "clearly implies that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage." App. I at 51. Thus, for example, vacation pay

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[4] The original administrative law judge had since left the Department of Labor.

constitutes wages, *Baldwin v. General Dynamics Corp.*, 5 BRBS 579, BRB No. 76-271 (March 15, 1977), as does overtime pay, *Gray v. General Dynamics Corp.*, 5 BRBS 279, BRB No. 76-105 (December 21, 1976), although neither is explicitly mentioned in section 2(13).[5] The question, then, is whether the benefit fund contributions are identifiable, calculable values received by the employees. We hold that they are.

We recognize that, as Morrison-Knudsen emphasizes, the contributions are made to the union funds, not to the employees, and that the individual employees have no voice in the day-to-day operation of the funds. The company cannot seriously maintain, however, that because the union funds receive the contributions, then the funds are the beneficiaries of the company's payments. The beneficiaries are the employees. The funds are no more than a channel; they are merely a means by which the company provides life insurance, health insurance, retirement benefits, and career training for its employees.

Further, it is indisputable that each of these benefits has substantial economic value to the employees. If they were not provided at the company's expense, each employee would have to spend his or her own money to acquire them. The Board apparently felt that it would be impossible to determine the "value" to an employee of the insurance policies, the career training, or the pension because whether and to what extent the employee might use them is highly speculative. This reasoning ignores the fact that an insurance policy must be bought and paid for whether or not a claim is ever made upon it. The economic advantage lies in the employer's provisions of such a policy at no cost to the employee. *See W. W.*

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[5] Similarly, transportation provided by the employer has been held to constitute "wages" under a state workers' compensation statute. *Leslie v. Reynolds*, 179 Ka. 422, 295 P.2d 1076, 1083 (1956).

Cross v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949).[6] The same is true of the retirement pension and the career training. With respect to the pension, we agree with the Michigan appellate court's statement in *Hite v. Evart Products Co.*, 34 Mich. App. 247, 191 N.W.2d 136 (1971):

> We may only speculate whether plaintiff would have worked a full 10 years for defendant [and thereby obtained a vested interest in the pension fund] had she not been injured. However, the *facts* are that at the time of the injury her employer was putting aside this potential benefit for her and that the injury prevented a continuation of this potential toward a vested interest. As the result of her injury she must find some other way of providing income for retirement. The pension payment was a part of her weekly wage.

191 N.W.2d at 139 (emphasis in original).[7] As for career training, that too is something the employee would

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[6] In *W. W. Cross v. NLRB*, 174 F.2d 875 (1st Cir. 1949), the First Circuit held that contributions to a group health insurance plan were "wages" for purposes of the mandatory bargaining provision of the NLRA as amended, 29 U.S.C. §§ 151 *et seq.* The court stated:

> [T]he word "wages" in § 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. And this is as far as we need to go, for so construed the word covers a group insurance program for the reason that such a program provides a financial cushion in the event of illness or injury arising outside the scope of employment at less cost than such a cushion could be obtained through contracts of insurance negotiated individually.

Id. at 878. *See also Inland Steel v. NLRB*, 170 F.2d 247 (7th Cir. 1949).

[7] We have discovered only one other state court case that addresses the issue whether benefit fund contributions are part of an employee's average weekly wage for purposes of a workers' compen-

have had to spend his or her own money to acquire. It is therefore as much an economic advantage as are the insurance policies and the pension. That an employee may choose not to participate in the career training opportunity does not make the opportunity any less valuable, for it is of course up to each employee to decide what to do with the consideration tendered by the employer in return for services rendered.

The Supreme Court's reasoning in *United States v. Carter*, 353 U.S. 210 (1957), is instructive. In *Carter*, the Court found contributions of seven and one-half cents per hour to a union health and welfare fund to be part of the "sums justly due" to employees under the Miller Act, 40 U.S.C. §§ 270a *et seq.*, and held accordingly that a federal contractor's surety was liable for such contributions when the contractor failed to pay them. The Court stated:

> It is undisputed that if the collective-bargaining agreement had required the contractor to pay each

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sation statute. That case, *Still v. Industrial Comm'n*, 27 Ariz. App. 142, 551 P.2d 591 (1976), is in direct conflict with the Michigan court's holding in *Hite*, quoted in the text above. In *Still*, the Arizona court viewed benefit fund contributions as akin to year-end bonuses, in that the amount the employer paid per hour worked by each employee remained the same without regard to the employee's rank or rate of pay. The court concluded that the contributions did not constitute wages because they were not the result of the employee's "individual effort," but rather resulted from the "collective effort" of the union's negotiations with the employer. With respect, we find this "individual effort" analysis unhelpful. It is immaterial that the benefits were obtained through the collective bargaining process, or that the benefits do not change according to job classification or seniority while rates of pay do change according to those criteria. The fact remains that the employer has agreed to furnish the employees with valuable benefits, in addition to hourly rates of pay, in return for the employees' services. The contributions are an important part of the employees' total compensation, and an equally important part of the employer's labor cost.

> employee 7½ cents per hour above the prevailing wage rate, and the employee had, by contract with his bargaining representative, agreed to contribute that sum to the fund, the surety would have been obligated to make good any default in the contractor's payment of that extra 7½ cents per hour.

Id. at 217. The same logic applies here. If Morrison-Knudsen paid the sixty-eight cents per hour to its employees, and the employees, in turn, paid this amount into the various funds, the sixty-eight cents per hour undoubtedly would be seen as part of the employees' wages. That result does not change simply because the company has agreed to eliminate two unnecessary steps by paying the contributions directly to the trust funds.

It may be true, as the Board observed, that the sixty-eight cents per hour "would in all likelihood not buy decedent's family similar kinds of protection," App. I at 52, but the possible inadequacy of the contributions is no reason to withhold them altogether. Moreover, we think the above quotation from the *Carter* case supports the conclusion that the most reasonable course is to measure the value of the fringe benefits by the amount of the employer's contributions to the benefit funds. We are not persuaded by the Board's concern that "if contributions to the various funds were included in the average weekly wage, it would appear that to [calculate compensation payments under] section 10B, one would have to find a fellow employee who not only worked similar hours at a similar wage scale, but who had a similar status vis a vis union funds as well." App. I at 52. Such fears are unfounded. The benefit fund contributions are made on a per-hour basis for each employee, without regard to the employee's "status vis a vis union funds." Thus, the contributions may be included in the average weekly wage under section 10(b) simply by determining the amount of the contributions made on behalf of the fellow employee who, having

worked similar hours, serves as the referent in any event.

Finally, Morrison-Knudsen's reliance on *United States v. Embassy Restaurant*, 359 U.S. 29 (1959), is misplaced. There the Court held that under the Bankruptcy Act, benefit fund contributions are not entitled to the priority given to "wages . . . due to workmen." The Court emphasized, however, that the Bankruptcy Act gave priority strictly to wages, and that it was not intended to include additional forms of compensation. *Id.* at 35. Here, by contrast, the Longshoremen's Act is expressly defined to include many forms of compensation within the concept of "wages." Further, the purpose of the Bankruptcy Act is to set a formula for distributing too few assets among too many creditors. Part of the Court's concern in *Embassy Restaurant* was that if contributions were given priority along with wages, "the workman [would] have to share with the welfare plan, thus reducing his own recovery." *Id.* at 34. Such a consideration is wholly absent in the present context. The purpose of the Longshoremen's Act is to provide prompt compensation for injured employees or their families. Congress chose to carry out this design by including in the compensation formula *all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of the injury. The Act is remedial, and we are obliged to construe it liberally, resolving doubts in favor of the claimant. *See, e.g., Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955). The strict construction given to the term "wages" in *Embassy Restaurant* is therefore inappropriate here.

In conclusion, it is clear that if the value received by the employee is reasonably identifiable and calculable, then it must be included in the average weekly wage of the employee. We hold that the fringe benefits at issue here amount to value received by the employees, and

that it is reasonable to measure such value by the amount of the employer's contributions to the various fringe benefit funds. Therefore, those contributions must be included as part of the employee's average weekly wage in computing the compensation due under the Act. Accordingly, that part of the Board's decision concerning fringe benefits is reversed.

II

In its cross-petition for review of the Board's order, the company contends that the Board erred in modifying the amount of attorney's fees awarded by the administrative law judge. As the Board stated:

> After careful review and consideration of the entire record . . ., we find that the administrative law judge's award of the attorney's fee herein is an abuse of discretion and contrary to law. Normally, the Board would remand this case to the administrative law judge for a second time for reconsideration; however, since Judge Thomas' Decision was of necessity based only upon a review of the records, as would be any subsequent decision he could render, in the interest of administrative economy the Board modifies the attorney's fee award to $6215.00. . . .

The fee award made by the administrative law judge was for services performed in connection with the proceedings before him. The pertinent regulation provides as follows:

> An attorney or other representative seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act *shall make application thereof to the persons, administrative body, or court before whom the services were performed.*

20 C.F.R. § 701.132 (emphasis added). The company contends that the Board, in modifying a fee award for

services performed before the administrative law judge, violated its own regulation. We disagree.

Initially, we note that the claimant's attorney complied with the requirement set out in the regulation: her attorney applied to the administrative law judge for attorney's fees for services performed before it.[8] Nothing in the regulation prohibits the Board from reviewing or revising the award set by the administrative law judge.

It is clear that the Board has the authority to review and reverse an administrative law judge's fee award if that award was an abuse of discretion. *Director, Office of Workers' Compensation Programs v. United States Steel Corp.*, 606 F.2d 53, 55 (3d Cir. 1979). The issue presented in the instant case is, however, more difficult: can the Board modify a fee award set by an administrative law judge rather than remand the case if the Board finds that award to be erroneous and an abuse of discretion. We find that the Board had such authority in this case where the determination of attorney's fees was properly based solely on the record, and the complete record was before the Board.[9] In its order,

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[8] The fees awarded by the Board for services performed in connection with proceedings before it are not at issue in this appeal.

[9] The instant case is distinguishable from *Director, Office of Workers' Compensation Programs v. United States Steel Corp.*, 606 F.2d 53 (3d Cir. 1979). In that case, the Board modified the fee award set by the administrative law judge, and the court of appeals reversed, finding that the Board exceeded its authority in modifying the award because the record did not contain "sufficient findings" on which the Board could have based its determination of the award. The court noted, however, that it was not deciding "the question of whether the Board may, when presented with a full factual record, draw an appropriate conclusion from that record." *Id.* at 56 n.12.

The other cases cited by the company are also inapposite. In *Ayers S.S. Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977), the claimant's attorney apparently applied to the court for fees for services performed before the court and the administrative law judge. The

the Board discussed the factors to be considered in determining a fee award and applied those factors to the information contained in the record regarding attorney's fees. We therefore agree with the Board that since the full record was before it, the policies of administrative economy and a speedy resolution of this claim were furthered by the Board's decision to modify the fee award rather than remand for a second time to the administrative law judge. Accordingly, we affirm the Board's award of attorney's fees.

The order appealed from is affirmed in part and reversed in part, and the case is remanded to the Benefits Review Board for further proceedings consistent with this opinion.

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court refused to award fees for work performed before the administrative law judge. The court did not discuss the question whether a fee award is subject to modification by the reviewing body. Similarly, in *Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs*, 594 F.2d 986 (4th Cir. 1979), the court held that, according to the regulation, the claimant's attorney must apply separately to the deputy commissioner, administrative law judge, Board, or the court for fees generated by services performed before that person or body.

APPENDIX D

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, DC 20036

SONYA HILYER (WIDOW OF JAMES H. HILYER),
Claimant-Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Employer/Carrier-Respondents

Filed as Part of the Record Mar. 19, 1980

BRB No. 78-568

DECISION AND ORDER

Appeal from the Decision and Order of Everette E. Thomas, Administrative Law Judge, United States Department of Labor.

George S. Leonard, Alexandria, Virginia, for the claimant.

Richard W. Galiher, Jr. (Galiher, Clarke, Martell and Donnelly), Washington, D.C., for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the claimant from the Decision and Order on Remand (76-DCWC-158) of Administrative Law Judge Everette E. Thomas, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as

extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq* (hereinafter, the Act).

This case was originally heard by Administrative Law Judge David W. Pelkey. Judge Pelkey awarded death benefits based on an average weekly wage computed under Section 10(b) of the Act. 33 U.S.C. § 910(b). He further concluded that certain fringe benefits were not includible in the determination of claimant's average weekly wage. He also awarded an attorney's fee to claimant's attorney. However, this fee was reduced from the $7,472.00 requested to $2,988.80. Employer appealed the administrative law judge's determination of average weekly wage under Section 10(b); claimant appealed the exclusion of fringe benefits from average weekly wage and the substantial reduction of the attorney's fee.

On appeal, the Board affirmed the administrative law judge's findings on average weekly wage but remanded the case for a detailed explanation of the substantial reduction of the attorney's fee. *Hilyer v. Morrison-Knudsen Construction Co.*, 6 BRBS 754, BRB Nos. 76-410/A (1977).

The case on remand was assigned to Administrative Law Judge Everette E. Thomas inasmuch as Judge Pelkey was no longer with the Department of Labor. Judge Thomas reconsidered the fee request and awarded claimant's attorney a fee of $4,000.00 based upon a review of the record.

On appeal, claimant contends that the administrative law judge's substantial reduction of the attorney's fee requested is an abuse of discretion and contrary to law. The amount of an attorney's fee award is discretionary. An award may be set aside only if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Offshore Food Service, Inc. v. Murillo*, 1 BRBS 9, BRB No. 73-141

(1974), *aff'd sub nom. Offshore Food Service, Inc. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975). In setting the amount of an attorney's fee, the administrative law judge should take into consideration the number of hours worked, the results obtained, the complexity of the case, the quality of the services, by whom the services were performed, and the prevailing rate for attorney in the area. *See* 20 C.F.R. § 702.132; *Palacios v. Campbell Industries*, 3 BRBS 37, BRB No. 75-190 (1973).

After careful review and consideration of the entire record and the foregoing principles, we find that the administrative law judge's award of the attorney's fee herein is an abuse of discretion and contrary to law. Normally, the Board would remand this case to the administrative law judge for a second time for reconsideration; however, since Judge Thomas' decision was of necessity based only upon a review of the record, as would be any subsequent decision he could render, in the interest of administrative economy, the Board modifies the attorney's fee award to $6,215.00. *See e.g. Linnell, Choate and Webber v. Heyde*, 330 F. Supp. 170 (D. Me. 1971); *McCormick ex rel. Kierr and Gainsburgh v. Donovan*, 247 F. Supp. 175 (E.D. La. 1965); *Di Costanzo v. Willard*, 165 F. Supp. 533 (E.D. N.Y. 1958); *Di Costanzo v. Willard*, 165 F. Supp. 540 (E.D.N.Y. 1958).

The administrative law judge's analysis does not clearly set forth the basis for his substantial reduction of the attorney's fee award. In reducing the award, the administrative law judge noted that the rate charged for counsel's law clerks, $32.00 per hour, was excessive; however, he did not indicate what he considered to be a reasonable rate. While the administrative law judge concluded that there was duplication of effort among the law clerks and between the law clerks and claimant's counsel, and that an extensive amount of time was devoted to research, he did not indicate how many of the hours charged for the law clerks' services were reasonable.

The Board finds that $25.00 per hour is a reasonable fee for the services of the law clerks. As to the question of duplication of effort among the lawclerks, a review of the fee request reveals that only entries for a total of five hours for June 29, 1976 and July 2, 1976 appear to be duplications. Thus, the amount requested as compensation for the services of counsel's law clerks should be reduced by five hours to eliminate this duplication. A review of the attorney's fee application reveals that 43.5 hours of the 84 law clerk hours charged were devoted to research. The Board finds that half of the law clerk hours charged to research were reasonably necessary herein so that the amount of law clerk hours should be further reduced by 21.75 hours. This reduction in hours plus the reduction of the five hours of duplication results in total allowable law clerk hours of 57.25. At $25.00 per hour, this results in a total allowable fee for the law clerks' services of $1,431.00.

The fee request also encompassed the charge of $4,784.00 based on 74.75 attorney hours at $64.00 per hour. The Board finds that both the hourly rate and the number of hours billed are reasonable and should be allowed. In awarding significantly less than the amount requested, the administrative law judge apparently concluded that an excess amount of time was devoted to research. Implicit in the administrative law judge's decision is the conclusion that, since there is little authority on the issue of whether fringe benefits are includible in determining average weekly wage, this issue warranted little research. We do not find this reasoning persuasive. Rather, the fact that this area of law is not well settled would warrant extensive research. Also implicit from the decision and order is the finding that since claimant was unsuccessful on the fringe benefit issue, claimant's attorney fee should be reduced. Neither Section 28(b) of the Act, 33 U.S.C. § 928(b), nor the applicable regulation, 20 C.F.R. § 702.132, limits the attorney's fee awarded to work on those issues on which the claimant prevails. *Cherry v. Newport*

News Shipbuilding and Dry Dock Co., 8 BRBS 857, BRB Nos. 77-562/A (1978). In *Cherry*, the Board concluded that attorneys should be compensated for necessary work and that work done on unsuccessful issues should not automatically be considered unnecessary. Rather, *Cherry* set forth the proposition that necessity should be considered from claimant's counsel pre-hearing viewpoint so that counsel should be compensated for work on issues that "must necessarily be raised in order to adequately protect a claimant's interest." 8 BRBS at 863. Accordingly, claimant's attorney's fee should not be reduced because claimant did not prevail on the fringe benefit issue.

While the administrative law judge concluded that there was duplication of effort between claimant's counsel and his law clerks, a review of the fee request reveals that this duplication is not sufficiently extensive to justify a reduction of the hours charged by counsel. Further, minimal duplication is essential for counsel to supervise the work of the law clerks.

Accordingly, since the Board finds that claimant's counsel should be compensated for all of the attorney hours charged, the attorney's fee award herein is modified to $6,215.00, based on 74.75 attorney hours at $64.00 per hour and 57.25 law clerk hours at $25.00 per hour.

Claimant's attorney has also requested approval of a fee for services rendered before the Board. This fee request is for $3,515.00 for 37 hours at a rate of $95.00 per hour, which includes time spent presenting oral argument before the Board. This fee request is based on counsel's hourly charges for the year 1976, ranging from $85.00 per hour for office time to $115.00 per hour for court time. Counsel averaged these rates to arrive at a fee of approximately $95.00 per hour.

We cannot agree with the averaging of rates. The Board finds that $85.00 per hour is a reasonable charge for counsel's office work. It should not be inflated by averaging. In addition, $115.00 per hour is a reasonable

fee for court time. The Board will allow this hourly rate for time spent presenting oral argument. In making this award, we recognize the experience of counsel.

Counsel billed 28 hours for review of the record, preparation of claimant's Petition for Review and brief, and preparation of claimant's response to employer's Petition for Review. Inasmuch as the issues on appeal had been fully developed before the administrative law judge, we conclude that 18 hours is a reasonable amount of time for this activity. Counsel also requested four hours to review the Director's brief. Counsel did not respond to this brief, which supported claimant's position. Two hours for this activity is reasonable. Finally, of the five hours counsel requested for preparation and presentation of oral argument, we find that two hours should be charged at the office time rate and three hours should be charged at the court time rate. Thus, a fee of $2,215.00 is awarded to claimant's attorney for services before the Board. This is based upon 22 allowable hours of office time at $85.00 per hour and three allowable hours of court time at $115.00 per hour.

Accordingly, claimant's attorney is awarded a fee for services before the Board and claimant's attorney's fee for services performed in the proceedings below is modified to conform with this Opinion.

SO ORDERED.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chief Administrative Appeals Judge

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 19th day of March 1980

APPENDIX E

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-DCWC-158

BRB Nos. 76-410 and 76-410A

OWCP No. 40-82056

In the Matter of

JAMES H. HILYER (DECEASED)
SONYA HILYER (WIDOW)
Claimant

against

MORRISON-KNUDSEN CONSTRUCTION CO.
Employer

and

ARGONAUT INSURANCE COMPANY
Carrier

George S. Leonard, Esquire
6207 Tally-Ho Lane
Alexandria, Virginia
Counsel for Claimant

Richard W. Galiher, Jr., Esquire
1215 Nineteenth Street, NW
Washington, DC
Counsel for Respondents

Before:

EVERETTE E. THOMAS
Administrative Law Judge

DECISION AND ORDER ON REMAND

This is a decision and order on remand of the captioned Matter from the Benefits Review Board's Decision of November 30, 1977, which followed an appeal from the Decision and Order of Administrative Law Judge David W. Pelkey in a claim filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*, as extended to the District of Columbia, 36 D.C. Code § 501 *et seq.* (hereafter, the "Act"). The matter was initially assigned to Judge Pelkey upon remand and was reassigned to the writer upon Judge Pelkey's resignation as an Administrative Law Judge. A prehearing conference was held with counsel for the parties on September 6, 1978 to determine the need for a supplemental hearing. It was agreed by Mr. Leonard and Mr. Galiher that a supplemental hearing was unnecessary because no additional evidence was to be presented by either side.

At the prehearing conference Mr. Galiher pointed out that a separate hearing was held on the issue of attorney's fee on August 27, 1976. (Tr. 48). His position is that the matter was remanded only for an explanation of the amount of fee awarded. Mr. Leonard argued that a complete redetermination of the fee could be made on remand. It is the undersigned's opinion that Mr. Leonard's position is correct. The memoranda of law filed by both parties have been carefully considered even though the brief for Counsel for Employer was filed beyond the date set.

Findings of Fact and Conclusions of Law

Judge Pelkey found that Employer was making voluntary payments from the date of injury based upon an average weekly wage of $205.92. Applying Section 10(b) of the Act, he determined that Claimant's average weekly wages were actually $289.00. The Benefits Review Board affirmed this determination.

In awarding an attorney's fee, Judge Pelkey properly considered Section 10(b) of the Act, which requires that only the difference between the amount tendered or paid and the amount awarded may be considered. However, he failed to explain the considerations which prompted him to reduce the fee from the $7,530 requested to the $2,988.80 awarded.

Under the circumstances, I find that the most sensible option to resolve the fee question is to reevaluate the services rendered after a review of the record. Mr. Pelkey is no longer sitting as an administrative law judge and he is therefore not available to state his reasons for the fee reduction. Even if I could determine how he arrived at the amount of $2,988.80, which I cannot, I still would be engaged in speculation. I therefore make the following determination based on a careful review of the record; an analysis of the issues; the evidence presented; and the arguments of counsel.

The fee request presented by affidavit filed August 27, 1976, covers all services from the date of engagement at the deputy commissioner level to the Decision of Administrative Law Judge Pelkey. Mr. Leonard's hourly rate for such services was $64 and that of his law clerks was $34. Considerable time was devoted to research on the issue of fringe benefit inclusion in average weekly wage determination,[1] however this argument was unsuccessful.

Considering the work done, the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded, I find the total amount requested to be rather excessive. If the justification for using law clerks is to reduce costs, then that purpose is frustrated by assigning an hourly rate nearly equal to the prevailing rate for experienced attorneys. Such rates are

[1] Although Mr. Leonard estimated that the fringe benefit research required only 10% of the total time billed, it appears that this was the more difficult of the two questions presented.

particularly questionable in the Washington Metropolitan Area where there is no shortage of legal talent. Furthermore, there appears to be some duplication of effort among the law clerks and between the clerks and Mr. Leonard. Also, much time was apparently devoted to legal research, yet the available authority on the principal issue, i.e. inclusion of fringe benefits in average weekly wage determination, is rather limited.

However, assuming that at least a substantial amount of the total time charged was reasonably necessary to obtain the resulting benefits, it appears that the amount awarded by Judge Pelkey was rather conservative. Considering the expertise of counsel, the legal work involved and the benefits obtained, I find that $4,000 is an adequate amount to compensate counsel. This amount is awarded for services before the deputy commissioner as well as at the formal hearing level,[2] but does not include an award for services before the Benefits Review Board. Such amount includes the time charged for the law clerks.

ORDER

Accordingly, it is hereby ordered that Respondents pay directly to George S. Leonard, Esquire, the sum of $4,000 for services rendered.

/s/ Everette E. Thomas
EVERETTE E. THOMAS
Administrative Law Judge

Dated: 10/5/78
Washington, DC

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[2] The case of *Fino v. Bethlehem Steel Corp.*, 5 BRBS 223, BRB No. 76-128 (December 17, 1976), was modified by the Board's Decision in *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, —— BRBS ——, BRB No. 78-237 (June 30, 1978).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 77-2076

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY &
ARGONAUT INSURANCE COMPANY,
Respondents

And Consolidated Case No. 78-1087

Filed Jul. 19, 1978

Before: Fahy, Senior Circuit Judge; MacKinnon, Circuit Judge

ORDER

On consideration of the motion to consider jurisdiction and of the response thereto, it is

ORDERED by the Court that the petitions for review herein are dismissed for lack of jurisdiction. See *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976).

This action is without prejudice to the filing of valid petitions upon completion of the administrative proceedings.

Per Curiam

APPENDIX G

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

Filed as Part of the Record Nov. 30, 1977

BRB Nos. 76-410
and 76-410A

SONYA HILYER (WIDOW OF JAMES H. HILYER),
Claimant-Petitioner
Cross-Respondent

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Employer/Carrier-Respondents
Cross-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

DECISION

Appeal from the Decision and Order of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

George S. Leonard, Washington, D.C., for the claimant.

Richard W. Galiher, Jr. (Galiher, Clarke, Martell and Donnelly), Washington, D.C., for the employer/carrier.

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Smith, Chairman, Hartman and Miller, Members.

Hartman, Member:

These are appeals by the claimant and the employer/carrier from a Decision and Order (76-DCWC-158) of Administrative Law Judge David W. Pelkey pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended to the District of Columbia, 36 D.C. Code § 501 *et seq.* (hereafter referred to as the Act).

James H. Hilyer who had begun working on a construction project for employer on November 7, 1973 was fatally injured during the course of his employment on April 19, 1974. Employer voluntarily paid death benefits to decedent's widow (claimant) since April 20, 1974, based upon an average weekly wage of $205.92. Employer reached this figure by adding together all of decedent's wages for the year preceding his fatal injury, and dividing the total by fifty-two weeks. In the year before his death, decedent had worked at lower paying jobs as a security guard and as a grocery clerk. Claimant however contended that the average weekly wage should be based on decedent's work in construction, and should reflect not only his salary but also the contributions made by employer to union pension, health and welfare, and training funds. The deputy commissioner agreed with the employer's method of calculating the average weekly wage. Following a hearing on these issues, the administrative law judge determined that decedent's average weekly wage should reflect only decedent's earnings as a construction worker. Accordingly, the administrative law judge pursuant to Section 10(b) of the Act, 33 U.S.C. § 910(b), based decedent's average weekly wage on the annual wages of a fellow employee

whose wages most closely resembled decedent's during the period he worked for employer. The administrative law judge did not apply Section 10(a) of the Act as decedent had not worked a full year in this or similar employment prior to his injury. The administrative law judge however rejected claimant's contention that employer's contributions to the union pension, health and welfare, and training funds were part of the average weekly wage.

Employer/carrier (hereafter the employer) appeal contending that decedent's average weekly wage should have been calculated under Section 10(c) of the Act and reflect all his earnings in the year prior to his injury. Claimant appeals contending that employer's contributions to union pension, health and welfare, and training funds should have been included in decedent's average weekly wage. Claimant also contends the attorney's fee awarded was inadequate. Claimant's attorney had requested a fee of $7,472. The administrative law judge awarded $2988.80 pursuant to Section 28(b) of the Act. 33 U.S.C. § 928(b).

Inasmuch as decedent had not been employed by employer or a similar employer for a year preceding his fatal injury, Section 10(a) of the Act which requires such a pre-condition is inapplicable. 33 U.S.C. § 910(a). Therefore, decedent's average weekly wage must be determined either pursuant to Sections 10(b) or (c) of the Act. 33 U.S.C. §§ 910(b), 910(c).

Section 10(c) gives the administrative law judge discretion to determine an injured employer's "actual earning capacity" at the time of the injury. Employer argues decedent's "actual earning capacity" was represented by all his earnings for the year prior to his injury, and not just by the wages earned at construction work.

However, Section 10(c) has traditionally been applied in cases where the injured employee's employment at the

time of injury was "intermittent and discontinuous in nature" and not calculable under Sections 10(a) or (b), or where calculations under Sections 10(a) or (b) would lead to a result contrary to the humanitarian purpose of the Act. *See O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979 (4th Cir. 1949). There has been no proof shown that decedent's work at the time of injury was "intermittent and discontinuous in nature." Moreover, Section 10(b) could clearly be applied in this case, and render a just average weekly wage fully in keeping with the policy behind Section 10 of arriving at a fair and reasonable determination of claimant's average weekly wage. Employer however argues that under controlling case law in the District of Columbia Circuit, average weekly wage should be based on all earnings for the year prior to injury and not solely on the employment at the time of injury. This argument must be rejected. In this argument, employer relies heavily on language found in *Liberty v. Britton*, 233 F.2d 699 (D.C. Cir. 1956). However, in *Liberty*, the court stressed that the average weekly wage of claimant injured at one employment who also worked a part-time job should reflect all his earnings *at the time of injury*. Clearly, this case is in accord with *O'Hearne, supra*, which expressed that compensation should be based on claimant's *true* earning capacity *at the time of injury*, and not on prior jobs that do not completely reflect his wage-earning capacity at the time of injury.

Claimant argues that the average weekly wage should have included employer's contributions to union health and welfare, pension and training funds.

Section 2(10) [sic] of the Act, 33 U.S.C. § 902(10), [sic] defines wages as:

> . . . the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable

> value of board, rent, housing, lodging or similar advantage received from employer, and gratuities received in the course of employment from other than the employer.

This language clearly implies that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage. Accordingly, under this definition, the Board has held that such things as overtime [*Gray v. General Dynamics Corp.*, 5 BRBS 279, BRB No. 76-105 (Dec. 21, 1976)] and vacation pay [*Baldwin v. General Dynamics Corp.*, 5 BRBS 579, BRB No. 76-271 (March 15, 1977)] can be included in the determination of the average weekly wage.

These decisions must be contrasted with the Board's decision in *Collins v. Todd Shipyards Corp.*, 5 BRBS 334, BRB No. 76-177 (Jan. 5, 1977) where it agreed with an administrative law judge's conclusion that contributions by an employer to a Health and Welfare Fund and a pension fund should not be included in the determination of the average weekly wage. The administrative law judge in that case stressed the speculative value of these contributions noting that such contributions did not directly flow to the employee. Rather, he has a vested right in these funds only if "he becomes ill or is injured in a non-job related illness or accident; [or if] he is eligible for a retirement pension." He further noted these contributions were not immediately includable in the employee's gross salary.

In the instant case, the record does not reflect whether decedent's rights in the pension had vested. Even if they were vested, inclusion of the contributions to the pension fund reflects a belief that the employee would also continue to work for employer and build up his pension. As for the health and welfare program, this is contingent on an illness occurring. In the case before us, it is ar-

gued that it should be determined if as a result of decedent's death, his family has lost the protection of his health benefits. Thus, the actual value of the health and welfare program is dependent on their possible use of it. Further, the amounts contributed by employer would in all likelihood not buy decedent's family similar kinds of protection. As for the training program, there is no indication decedent took advantage of it or was going to take advantage of it. Any value of the training program is highly speculative.

Therefore, it is clear that in this case that an employee's right to these funds and the actual value of them to the injured employee is highly speculative. Moreover, inclusion of these forms of benefits would actually appear to preclude the ready application of Section 10(b) of the Act. Under Section 10(b), the average weekly wage is not based on the injured employee's earnings but on the earnings of a fellow employee of the same class. However, if contributions to the various funds were included in the average weekly wage, it would appear that to apply Section 10(b), one would have to find a fellow employee who not only worked similar hours at a similar wage scale, but who had a similar status vis a vis union funds as well. This approach would render Section 10(b) useless in many cases, and would negate part of the statutory scheme.

Accordingly, the Board concludes that the administrative law judge did not err in concluding that employer's contributions to the union pension, health and welfare, and training funds should not be included in a determination of an injured employee's average weekly wage.

Claimant also argues that the administrative law judge's award of the attorney's fee was inadequate given the number of hours claimant's attorney spent on the case.

Claimant's attorney requested a fee of $7,530 based on 74.5 hours of his own time at $65 an hour and 84 hours of his law clerk's time at $32 an hour. A hearing was held below on this fee request. At the hearing, employer's primary objections were aimed at a fee based upon time spent at the administrative level, time spent researching the issue of fringe benefits, and the excessive number of hours and hourly rate for the law clerks. Claimant's attorney was awarded a fee of $2,988.80 pursuant to Section 28(b) of the Act, 33 U.S.C. § 928(b). No explanation was given for the size of the fee award.

The administrative law judge's award of an attorney's fee can be overturned only if the fee was not in accordance with law or was arbitrary, capricious or an abuse of discretion. *See Offshore Food Service, Inc. v. Murillo*, BRB No. 73-141 (May 19, 1974), *aff'd, Offshore Food Service, Inc. v. Benefits Review Board*, 524 F.2d 967 (5th Cir. 1975). Given the many variables in this case, the Board cannot adequately determine on review whether the fee ultimately awarded was proper. Particularly helpful to an adequate review of this issue would be specific discussion by the administrative law judge of the factors on which he based his fee award including whether the fee encompassed work done at the administrative level [*See Fino v. Bethlehem Steel Corp.*, 5 BRBS 223, BRB No. 76-128 (December 17, 1976)], whether the fee included the work done on the issue of whether fringe benefits should be included in the average weekly wage, whether the hours spent by the law clerks were included in the fee award, and what he viewed as a reasonable hourly rate for the law clerk's work. [*See Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1177 (9th Cir. 1976)].

Accordingly, the case must be remanded for a more complete analysis of the issue of attorney's fee. In all other respects, the Decision and Order below is affirmed.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chairman

/s/ Ralph M. Hartman
RALPH M. HARTMAN
Member

/s/ Julius Miller
JULIUS MILLER
Member

Dated this 30th day
of September, 1977

APPENDIX H

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-DCWC-158

OWCP No. 40-82056

In the Matter of:

JAMES H. HILYER (DECEASED),
Claimant

v.

MORRISON-KNUDSEN CONSTRUCTION CO.,
Employer

SELF-INSURED

GEORGE STEPHEN LEONARD, ESQUIRE
Leonard, Glammer & Flues
1019 - 19th Street, N.W.
Washington, D.C. 20036
For the Claimant

RICHARD W. GALIHER, ESQUIRE
1215 - 19th Street, N.W.
Washington, D.C. 20036
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER

Claimant Sonia Hilyer seeks compensation, in the form of death benefits, as the widow and for the minor children of James H. Hilyer (decedent), and attorney's fee under

the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.* Hereafter, those acts are cited as the Act. This Decision and Order follows July 1 and August 27, 1976, hearings that were conducted in accordance with 5 U.S.C. 554. At the first hearing, the parties represented that they had reached agreements as to the issue to be adjudicated and as to facts to be taken as admitted. Those agreements, framed as stipulations, follow:

Stipulation Issue to be Adjudicated

Whether the average weekly wages of decedent, who worked as a laborer for Employer for 5 months and 13 days immediately prior to a fatal injury, but who worked as a food clerk and a security guard (for two other employers) for the balance of the year immediately preceding the injury, are to be computed in accordance with the provisions of 33 U.S.C. 910(a).

Stipulation of Facts to be Taken as Admitted

1) On April 19, 1974:

A) Decedent was regularly employed by Employer as a laborer and performed assigned duties in the District of Columbia (District);

B) Employer, in the usual course of business, carried on employment in the District;

C) While performing assigned duties, at the time and place designated for such performance, decedent sustained an injury.

2) As a result of the April 19 injury, decedent expired on April 21, 1974.

3) At the time of the death of decedent, Sonia Hilyer was his wife and was living with him as his wife.

4) At the time of the death of decedent, he and Sonia Hilyer were the parents of James H. Hilyer, Jr., born November 30, 1966, and Bryan M. Hilyer, born May 7, 1970.

5) As a result of the death of decedent, Employer has paid death benefits, under the Act, to his widow and minor children at a weekly rate of $137.28 (based on average weekly wages totalling $205.92) since April 20, 1974.

6) The $205.92 amount represents a wage computation effected by Employer in accordance with its stated understanding of the requirements of the Act.

Prior to the initial hearing, Claimant sought production of records of earnings of decedent and earnings of any individual employed by Employer, between April 1973 and April 1974, "of the same class of worker and member of the same Union and Local" as decedent. Employer responded that it would produce documents covering employees in the quoted class only on order of an "Administrative Law Judge pursuant to regulations." The response stated that Employer would produce statments that would show decedent's "earnings in this and other occupations during the 52 weeks prior to his injury;" that such information is required for computation of average weekly wages under 33 U.S.C. 910(a) (10(a)); that such statutory provision is proper for use in the instant claim; and that information bearing on "what an employee of the employer made who worked for the *entire* 52 weeks prior to the injury is irrelevant."

The document-production issue was not resolved when the July 1 hearing opened. Oral arguments were submitted by the parties. Claimant submitted that wage computation properly was to be accomplished in accordance with the provisions of 33 U.S.C. 910(b) (10(b)) or 910(c) (10(c)). Employer submitted that wage computation properly was to be accomplished in accordance with the provisions of 10(a).

In pertinent parts, 33 U.S.C. 910 provides:

"(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

"(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earning if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

"(c) if either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reason-

ably represent the annual earning capacity of the injured employee.

"(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

Evidence adduced during the hearing and arguments established that decedent worked for Employer as a laborer for approximately 5 months immediately preceding his April 19 injury. It established that, for the remainder of the immediately preceding 12 months, he worked for two other employers as a security guard and as a food clerk.

The administrative law judge noted that, in a usual and ordinary sense, "employment" is defined as vocation, trade or profession (an occupation by which a person earns a living). Application of that definition to the quoted 10(a) resulted in his determination that the provision would control determination of decedent's wages only if he had worked as a laborer for substantially the whole of the pertinent year. The evidence revealed that decedent had not so worked. Accordingly, the administrative law judge ruled that, absent a showing of cause why "employment" should not be considered in the usual and ordinary meaning, 10(a) is not for application herein. He ordered that Employer furnish Claimant documents suitable for computation of wages according to the provisions of 10(b). Additionally, he ruled that, assuming for purpose of example that 10(a) was proper for application herein, the documentation tendered by Employer was unacceptable because it covered work as a laborer, a security guard and a food clerk. Again, absent a showing of cause why "employment" should not be considered in its usual and ordinary sense, he ruled, 10(a) required documentation relating only to work as a laborer.

Employer took exceptions to the rulings and order, indicated an intention to comply therewith and requested leave

to submit a brief in support of its request that the rulings and order be reconsidered. Leave was granted.

At that July 1 hearing, Sonia Hilyer testified as to decedent's marriage, children, employment, earnings, and union membership. For her, a business agent of decedent's union testified as to membership, benefits derived therefrom and Employer's contributions to health and welfare, pension and disability, and training trust funds that are administered by the union. For Employer, an employee of an insurance adjuster testified as to the manner in which she computed the $205.92 on which Employer based the $137.28 death benefit payments that have been made to the widow and children of decedent.

Employer's brief was filed on August 6, 1976, and Claimant's reply brief was filed on August 17. In Employer's brief, the firm was read as having abandoned the posture that 10(a) guidelines are proper for application herein. Outright rejection of that posture was evidenced by the submission of a reason "why 10(a) and 10(b) should not be forced in a case such as this." Employer's abandonment and rejection of its 10(a) posture were read as abandonment and rejection of its challenges to be the July 1 rulings of the administrative judge relating to 10(a). The rulings, now considered to be unchallenged, are unchanged.

On brief, Employer was read as having adopted a posture that it rejected at the July 1 hearing. Employer was read as proposing that 10(c) guidelines are proper for application herein. This new posture was considered as a challenge to an unequivocal July 1 ruling that wage computation be effected pursuant to 10(b). That the July 1 ruling was not so unequivocal is evidenced by a statement the administrative law judge made relative to developments following the submission of 10(b) documents by Employer:

> "Then, if it develops the information submitted under 10(b) is determined not to be a fair and rea-

sonable basis on which to determine the deceased's average weekly wages, at that point we go to 10(c), as I see it. This is the posture I am taking in this matter.

"Mr. Galiher: We will argue on that, I am sure." (Transcript, pg. 20, lines 12-17).

Under the Act, 10(c) documents are proper for consideration only after a determination that 10(a) and 10(b) guidelines "cannot reasonably and fairly be applied." Accordingly, the administrative law judge read Employer's brief as offering support for the proposition that, because application of 10(c) guidelines is so patently proper herein, no consideration need be given to 10(b) guidelines.

The factual position Employer submitted for consideration in wage determination is reflected by the following statements on brief:

"In the present situation, we have laborers who work sometimes 40 hours a week and sometimes less. In the case of the decedent, most of the time it appeared that he also worked overtime but his work was discontinuous in that he did not work the full year in laboring employment" (pg. 5, lines 1-4).

"In the present case of decedent, James H. Hilyer, although other employees were employed substantially the whole year, James H. Hilyer's employment was for a discontinuous period" (pg. 5, lines 20-22). "All employments have been included in compliance with the fairness test set forth in 10(c)" (Pg. 5, lines 24-25).

In support of its factual submission, Employer cited cases, as follows:

A) *Rex v. Collura*, 329 F. Supp. 696 (1971), wherein the court found that the Claimant's work as a watchman "was clearly of an 'intermittent and discontinuous' na-

ture." Because such work was intermittent and discontinuous in nature, computation under 10(c) was found to be proper.

B) *Mahony v. Marshall*, 46 F.2d 539 (1931), wherein the court found that the longshoring industry was of irregular character and held that, because longshore work was employment of recognized intermittence with an element of discontinuousness, computation under 10(c) was proper. Significantly, the court said, at page 554:

> "If Claimant had been recently engaged as longshoreman and his previous employment had been in another class of work and wage scale, his annual earnings in the instant work could only be determined by the earnings of 'other employees' in the same or similar work and class as a basis."

C) *Marshall v. Mahony*, 56 F.2[d] 74 (1932), affirming *Mahony*, above, so far as a 10(c) computation was involved, wherein, as quoted by Employer on brief, the court noted that 10(a) and 10(b) cannot reasonably and fairly be applied to an industry where employment is casual, irregular, seasonal, intermittent and discontinuous.

D) *Luckenbach v. Marshall*, 49 F.2[d] 625 (1931), wherein, as quoted by Employer, the court noted that computation pursuant to 10(b) is proper for employment, the nature of which is steady and regular. However, the factual situation in that case involved longshore work that, at the port in Portland, was irregular and discontinuous, work that dictated computation under 10(c). The element of the decision quoted by Employer was read as being persuasive that the provisions of 10(b) should be followed in the instant matter. The inference drawn by the administrative law judge from record evidence is that decedent was engaged in employment that was regular and steady in nature; he, at the time of his fatal injury, was following an occupation in which he reasonably might have been expected to work at least a year.

E) *Johnson v. Britton*, 290 F.2d 355 (1961), wherein the court found that the construction industry in which the Claimant worked was seasonal, intermittent (because of inclement weather), and one in which workers were paid by the hour and on a day-to-day basis. For those reasons, the court found computation under 10(c) to be proper.

F) *Liberty v. Britton*, 233 F.2d 699 (1956), wherein the court compared the provisions of 10(c) with the companion provision of the New York State Workmen's Compensation Law. That matter involved a claimant who, for a two-year period, worked full-time for an elevator construction firm and part-time for a grocery firm. The court noted that, whereas the New York 10(c)-type statute dealt with employment, the more broad provisions of 10(c) dealt with earnings. Such is the context in which Employer's quotations from the decision are evaluated. So evaluated, they are of no persuasive probative value in resolving a challenge to applicability of 10(b) in the instant matter.

G) *Stutz v. Independent*, 3 BRBS 72 (1975), wherein the Benefits Review Board discussed the propriety of considering earnings as a tavern employee in conjunction with a Claimant's earnings as a "casual longshoreman." Cases referenced by the Board make it clear that computation under 10(c) was under consideration.

Factually, Employer emphasized decedent's "discontinuous" work, his work for a "discontinuous" period, and submitted that such work and period support computation under 10(c). The submission was not supported by the cited cases. In all such cases except *Liberty*, the courts and Board were concerned with the *nature* of employment. There was concern with employment that, *by its nature*, was intermittent, discontinuous, irregular, casual, and/or seasonal, as opposed to work that, by its nature, was steady and regular. "Discontinuous," as used by Employer, was not read as relating to the nature of

decedent's employment by Employer; it was read as relating to the duration of decedent's employment by Employer. By reason of the fact that the concept involved in Employer's submission differed from the concept involved in the cited cases, the cases were determined not to be supportive of the submission.

Rather, the record is considered to be supportive of a factual determination that decedent's employment by Employer was, by nature, steady and regular. It is considered to be supportive of a factual determination that decedent's employment by Employer was not, by nature, intermittent, discontinuous, irregular, casual, and/or seasonal.

Precedent for resolution of Employer's challenge to the order that documents be produced for computation under 10(b) is considered to be found in *O'Hearne v. Maryland Casualty Co. et al.*, 177 F.2d 979, CA4, Nov. 7, 1949. Therein, the claimant had worked for the employer (in employment that was not challenged as being intermittent or discontinuous) for only two days prior to the injury. Employment during the rest of the year preceding the injury included work as a cook and a painter in addition to a period of imprisonment. A deputy commissioner issued an order based on computation of wages under 10(b). A district judge enjoined enforcement of the order on the ground that computation should have been based on 10(c). The court of appeals reversed the district judge and found the deputy commissioner's 10(b) order to be proper.

In view of all the foregoing, it is concluded that Employer has presented no legally supportable justification for modification of the July 1 order requiring Employer to produce documents required for computation of wages pursuant to the provisions of 10(b).

At the August 27 hearing, additional arguments were presented relative to the propriety of use of 10(b) guide-

lines. For the reasons hereinbefore set forth, the administrative law judge ruled that his earlier ruling relating to 10(b) was affirmed. On the basis of his examination and evaluation of documentation then in the record, he ruled that 10(b) reasonably and fairly should be used in computation of decedent's average weekly wages, he rejected the computation that had been effected by Claimant, and he gave counsel the opportunity to effect another computation.

Counsel were unable to agree on identification of the employee, referenced in 10(b), whose wage or salary should be used in the computation. The administrative law judge thereupon determined that the employee whose total payroll earnings most closely equalled those of decedent during the period of decedent's employment by Employer, reasonably and fairly represented the statutory employee.

On that basis, counsel computed and the administrative law judge adopted an average weekly wage totalling $289.00. At that point, Claimant's submission, that the computation should include Employer's contributions to health and welfare, pension and disability, and training trust funds administered by the decedent's union, was rejected by the administrative law judge and he concluded that, at the time of his death, decedent's average weekly wages totalled $289.00.

Claimant's attorney filed a petition for fee that itemized the dates, the services and the hours he and two law clerks devoted to prosecution of the claim. At the August 27 hearing, Employer tendered oral argument in opposition to certain elements of the petition; argument in rebuttal was tendered by Claimant.

The administrative law judge reads the petition and the arguments as having been directed to award of a fee under 33 U.S.C. 928(a) (28(a)). However, the facts in this matter are determined to dictate an award under 33

U.S.C. 928(b)(28)(b)). The record reveals that Employer has paid compensation, without an award, based on average weekly wages, totalling $205.02. Only the amount of compensation, as reflected by the disagreement over determination of the proper average weekly wages, has been put in issue in this claim. The issue has been resolved by the determination that compensation must be based on average weekly wages totalling $289.00.

Under 28(b), the fee must be "based solely upon the difference between the amount awarded and the amount tendered or paid," taking into account the amount of compensation recommended by the deputy commissioner. The record reveals that, during informal proceedings, the deputy commissioner recommended compensation based on average weekly wages totalling $205.92.

Accordingly, it becomes apparent that the professional efforts of Claimant's attorney have resulted in a 40 percent increase in the basis for computation of compensation and a comparable increase in the amount of compensation properly payable.

After consideration and evaluation of the amount of the requested fee, the arguments in opposition and support of that amount and the provisions of 28(b), it is concluded that $2,988.80 constitutes a reasonable fee for services rendered Claimant herein. Award of such a fee is made and approved.

Findings of Fact

As stipulated heretofore in this Decision and Order, the facts to be taken as admitted are found to be established.

On April 19, 1974, decedent's average weekly wages totalled $289.00.

Conclusions of Law

1) On April 19, 1974:

A) Decedent was an employee within the meaning of the Act;

B) Employer was an employer within the meaning of the Act;

C) Decedent suffered an accidental injury that arose out of and in the course of his employment by Employer.

2) Decedent died on April 21, 1974, as a direct result of the injuries suffered on April 19, 1974.

3) At the times of his injury and death, decedent was married to and survived by a widow, Sonia Hilyer, and was the father of and survived by two children, James Jr., and Bryan Hilyer.

Decision

The average weekly wages of decedent, who worked as a laborer for Employer for 5 months and 13 days immediately prior to a fatal injury, but who worked as a food clerk and security guard (for two other employers) for the balance of the year immediately preceding the injury, are to be computed in accordance with the provisions of 33 U.S.C. 910(b).

Order

That, based on April 19, 1974, average weekly wages totalling $289.00 and from April 21, 1974, Employer pay death benefits to the widow and surviving children of decedent, as required by 33 U.S.C. 909.

That, as to any installment of death benefits that was required to be, but was not, paid within 14 days after it became due, Employer pay the recipients an additional amount equal to 10 percent of any such installment.

That, as to any installment of death benefits not paid when due, Employer pay the recipients interest at an annual rate of 6 percent until paid.

That Employer pay George S. Leonard, Esq., $2988.80 for services rendered herein.

/s/ David W. Pelkey
DAVID W. PELKEY
Administrative Law Judge

Dated: September 7, 1976
Washington, D.C.

APPENDIX I

D.C. Code, § 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.

The provisions of chapter 18 of title 33, U.S.Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. May 17, 1928, ch. 612, § 1, 45 Stat. 600.

U.S. Code, 33 U.S.C. 902(13). Longshoremen's and Harbor Workers' Compensation Act.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(19).

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

33 U.S.C. § 906. Compensation

Time for commencement

(a) No compensation shall be allowed for the first three days of the disability, except the benefits provided

for in section 907 of this title: *Provided, however,* That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.

Maximum rate of compensation

(b) (1) Except as provided in subsection (c) of this section, compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

33 U.S.C. 909. Compensation for death

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $1,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

• • • •

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but

the total weekly benefits shall not exceed the average weekly wages of the deceased.

(f) All questions of dependency shall be determined as of the time of the injury.

33 U.S.C. § 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employ-

ment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

40 U.S.C. 276(b). Davis-Bacon Act.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or

to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

No. 81-1891

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
and
ARGONAUT INSURANCE COMPANY,
Petitioners,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

PETITIONERS' SUPPLEMENTAL MEMORANDUM

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and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

PETITIONERS' SUPPLEMENTAL MEMORANDUM

If there had been any doubt that the opinion below would have a far-reaching and unsettling influence upon the law of workers' compensation, that doubt has now been laid to rest by the Ninth Circuit's ruling on September 14, 1982, in *Duncanson-Harrelson Co.* v. *Director*, Nos. 79-7093 and 79-7094.[1] A copy of that ruling is printed as an Appendix hereto.

The Ninth Circuit, in Section V of its opinion, has fully adopted and endorsed the opinion below. Thus, the District of Columbia Circuit's conclusion is now the law throughout the Ninth Circuit, where, as noted in our

[1] In our Reply Brief in the instant case, we stated (p. 3) that the Ninth Circuit had not yet calendared *Duncanson-Harrelson* for argument. This statement was based upon an assurance by counsel for one of the appellants in the case. We are now told that counsel misunderstood the inquiry and thought that, since the case had been pending for almost two years, the question was whether the case would be *re-calendared* for argument.

Reply Brief (p. 4), it is not uncommon for a single employer to contribute to eight different union funds. Payments to all of these funds, as well as others, are now incorporated into the definition of "wages" in the LHWCA.

The Ninth Circuit appears to concede that when Congress passed the LHWCA in 1927, it did not intend for payments to union funds to be included in the definitions of "wages" or "average weekly wage." Thus, after noting in a footnote (n.7) the argument of the Labor Department that this Court's decision in *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268 (1980) "supports the view that we must interpret the term 'wages' according to the definition that was commonly accepted in 1927," the court added, "We disagree." But the Ninth Circuit does not cite any legislative history—nor is there any—for the proposition that Congress changed its mind after 1927. We respectfully submit, therefore, that the Ninth Circuit's ruling amounts to judicial legislation.

We urge this Court to grant certiorari to resolve a serious matter in the compensation field that has now taken on national implications.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. CA 79-7093

No. BRB 76-314

DUNCANSON-HARRELSON COMPANY and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WAUSAU,
Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

NANCY A. FREER,
Claimant.

No. CA 79-7094

No. BRB 76-314A

NANCY A. FREER,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondent.

[Filed Sept. 14, 1982]

Petition to Review a Decision of the
Benefits Review Board
United States Department of Labor

Argued December 10, 1980

Submitted April 6, 1982

Before: TRASK and ANDERSON, Circuit Judges, and STEPHENS,* District Judge

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OPINION

TRASK, Circuit Judge:

Claimant Freer challenges the amount of compensation awarded her under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976) (Act or LHWCA), by the Benefits Review Board (BRB). Freer's husband (the decedent) was employed as a pile driver and was killed over navigable waters while cutting pilings for the construction of a pier. Freer asserts that the Administrative Law Judge (ALJ) and the BRB erred in determining the amount of compensation by applying the wrong subsection of 33 U.S.C. § 910 and by failing to include employer contributions to the union pension and health funds as part of decedent's wages.

Defendants Duncanson-Harrelson Company and its liability insurer (collectively D-H) also appeal urging that the decedent was not covered by the Act. D-H argues alternatively that decedent did not meet the Act's test of

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* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

coverage or that he belonged to a class of employees specifically excluded.

I. FACTS

David W. Freer, the decedent, was killed while working as a pile butt or pile driver on the expansion of the oil tanker docking facilities operated by Pacific Gas & Electric Company in Pittsburg, California. The dock extends into Suisun Bay, a body of navigable water, and D-H was expanding the facilities at the Pittsburg dock to accommodate a rising volume of fuel oil deliveries. Decedent was employed by D-H and was fatally injured when the top of a dolphin piling he was cutting fell on him. The dolphin was located in 35 feet of water, approximately 25 feet from the nearest dock.[1]

Decedent's wife was awarded death benefits by the ALJ who found that the decedent was killed over navigable waters, that he was engaged in maritime employment and was therefore an employee within section 2(3) of the Act. The ALJ also found that decedent was not a member of the crew of the crane barge on which he worked. The ALJ applied section 10(c) of the Act to determine decedent's average weekly wage in the amount of $368.64.

Both D-H and the claimant appealed the decision of the ALJ to the BRB. D-H challenged the findings that decedent was engaged in maritime employment and that he was not a member of the crew of a vessel. The claimant sought review of the average weekly wage computation arguing that the ALJ erred in applying section 10(c) rather than section 10(a) of the Act in determining the amount. Claimant also urged that the ALJ erred in failing to include certain fringe benefits in the compu-

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[1] A dolphin is a free standing pier consisting of metal, concrete or wooden pilings which support a concrete deck. Dolphins are used as temporary docks and as abutments.

tation of decedent's earnings. The BRB affirmed the decision of the ALJ. The parties press the same arguments in their appeal to this court.

II. STANDARD OF REVIEW

The Findings of Fact of the ALJ are reviewed by the BRB under the "substantial evidence" standard. 33 U.S.C. § 921(b)(3). The courts have held that the BRB must accept the ALJ's determinations unless they are contrary to the law, irrational, or unsupported by substantial evidence. *E.g., Director (OWCP) v. Campbell Industries*, 678 F.2d 836, 838 (9th Cir. 1982). We must review BRB decisions for " 'errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations.' " *Id., citing Bumble Bee Sea Foods v. Director (OWCP)*, 629 F.2d 1327, 1329 (9th Cir. 1980). In *Duncanson-Harrelson Co. v. Director (OWCP)*, 644 F.2d 827, 830 (9th Cir. 1981), this court indicated that the BRB's determinations should be given deference since an administrative agency's interpretation of the statute which it administers is deserving of considerable respect. 644 F.2d at 830. *See, e.g. E. I. duPont de Nemours & Co. v. Collins*, 432 U.S. 194, 209 (1947). The Supreme Court, however, has noted that because the BRB does not make policy, its interpretations of the LHWCA are not entitled to any special deference. *Potomac Electric Power Co. v. Director (OWCP)*, 449 U.S. 268, 278 n.18 (1980).

III. COVERAGE OF DECEDENT UNDER THE ACT

A. Maritime Employment

Before the 1972 amendments to the Act, a single geographic test (the "situs" requirement) governed coverage. An employee was entitled to benefits if he was injured while working on or over navigable waters of the United States, even though his occupation was not "maritime." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 72 (1979).

There was also a requirement that the worker's employer have at least one employee, not necessarily the injured one, engaged in maritime employment. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264 (1977). Because most of those who employ workers for jobs on or over navigable waters also employ someone in a traditional maritime capacity, this second requirement was nearly always met, leaving the situs test as the only operative limitation on coverage.

The 1972 amendments expanded the definition of "navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel . . . ." 33 U.S.C. § 903(a). *See Caputo*, 432 U.S. at 260-64. But an injury sustained in this expanded area is covered only if the employee was engaged in "maritime employment" which includes "any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker" but not "a master or member of any vessel or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 902(3).

In *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976), this court held that in order for an injured employee's work to be considered "maritime," it "must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,'" . . . . *Id.* at 961, *quoting Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 272 (1972).[2] Although

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[2] We note that the Fifth Circuit in a recent *en banc* decision reexamined the *Weyerhaeuser* interpretation of "maritime employment" and, based on the legislative history of the 1972 amendments to the Act, rejected the view that Congress intended to withdrew coverage from workers who previously were entitled to benefits based on the "situs" test alone—*i.e.* workers injured on navigable

D-H argues that the decedent's employment as a pile driver on a marine construction project fails to satisfy the *Weyerhaeuser* test for "maritime employment," we recently stated that the Act covers workers involved in construction related to maritime activities. *Schwabenland v. Sanger Boats*, Nos. 81-7064, 81-7075, slip op. at 3345 (9th Cir. July 26, 1982). In *Duncanson-Harrelson Co. v. Director (OWCP)*, 644 F.2d 827, 830 (9th Cir. 1981), a case involving facts very similar to the present appeal, we upheld the finding of the BRB that two employees, injured while constructing an off-shore dock for the unloading of oil from tankers, were engaged in maritime employment. One of the claimants was constructing a dolphin when his injury occurred. Similarly, the decedent in the present case was killed when the top of a dolphin piling he was cutting fell on him.

B. Member of a Crew of a Vessel

D-H argues that decedent was a crew member as defined by section 2(3) of the Act, 33 U.S.C. § 902(3). Section 2(3) provides that "the term 'employee' means any person engaged in maritime employment . . ., but such term does not include a master or member of a crew of any vessel . . . ." To find that an employee is a

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waters whose employment was not maritime in nature. *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982). The result in this appeal would be the same regardless of whether the Ninth or the Fifth Circuit's interpretation is applied: we find decedent's employment to be "maritime" even under the narrower *Weyerhaeuser* standard. The debate over the scope of "maritime employment" will be resolved when the Supreme Court reviews the Second Circuit's decision in *Churchill v. Perini North River Associates*, 652 F.2d 255 (2d Cir. 1981), *cert. granted sub nom. Director (OWCP) v. Perini North River Associates*, 102 S. Ct. 1425 (1982). In *Perini*, the Second Circuit denied compensation under the Act to workers injured over navigable waters who were engaged in the construction of a sewage treatment plant. The court held that the work on the sewage treatment facility did not constitute "maritime employment."

member of a crew excluded from coverage, the court must conclude that the vessel is in navigation, that the worker had a permanent connection with the vessel and that the employee was aboard the vessel primarily to aid in navigation. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *accord, Burks v. American River Transportation Co.*, 679 F.2d 69, 75-76 (5th Cir. 1982). Whether the decedent was a master or crew member is primarily a question of fact. *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1345 (5th Cir. 1980); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 389 (6th Cir.), *cert. denied*, 346 U.S. 817 (1953). Thus, the finding of the ALJ that decedent was not a member of a crew must be affirmed if it is supported by substantial evidence. *South Chicago Coal & Dock Co. v Basset*, 309 U.S. 251, 257 (1940); *Hardaway Contracting Co. v. O'Keeffe*, 414 F.2d 657, 660-61 (5th Cir. 1968). The Supreme Court in *Bassett* stated that the question turns upon the employee's actual duties and held that the claimant's employment did not aid in navigation except for the incidental task of throwing the ship's rope or securing the line—duties which could be performed by any harbor worker. 309 U.S. at 260. The ALJ in this case made similar findings regarding decedent Freer's duties. The ALJ stated:

> [Decedent] did not have a permanent connection with the barge. He neither ate nor slept on the barge. In addition, he was not aboard the barge primarily to aid in navigation. *See Ryan* [*v. McKie Co.*, 1 BRBS 221 (1975)]. Anything he did in this regard was incidental to his primary work as a pile butt. As the Court noted in *South Chicago Coal & Dry Dock Co. v. Bassett*, 309 U.S. 251, 60 S. Ct. 544, 549, 'They were persons serving on vessels, to be sure, but their service was not of laborers . . . and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.' Moreover, it is not without signifi-

> cance that at the time of his death Mr. Freer was not even aboard the barge but instead was standing on the dolphin.

C.T., Vol. I at 198. The determination of the ALJ that decedent was not a member of a crew was upheld by the BRB. We affirm on the basis that the findings of the ALJ are supported by substantial evidence.

IV. APPLICATION OF SECTION 910(c)

Claimant challenges the use of subsection (c) of section 910 of the Act and urges that subsections (a) or (b) should be applied to compute the decedent's average annual earnings.[3] The parties disagree on whether the

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[3] 33 U.S.C. §§ 910(a), (b), (c) provide in pertinent part:

> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.
>
> (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most

issue is one of law or fact. We consider the nature of the decedent's work and the details of his employment to be factual findings. Whether particular facts fit within the meaning of certain legal terms is a question of law. *Cf. Estate of Franklin v. Commissioner*, 544 F.2d 1045, 1047 n.3 (9th Cir. 1976) (characteristics of transaction are questions of fact, but whether such characteristics constitute a "sale for tax purposes" is a question of law); K. Davis, *Administrative Law Treatise* § 30.01 (3d ed. 1972) (circumstances of arrest are questions of fact, but whether such circumstances amount to "probable cause" is a question of law). *But cf. Parkside, Inc. v. Commissioner*, 571 F.2d 1092, 1094-95 & n.5 (9th Cir. 1977) (two judges concurred in result, no majority rationale) (whether realty was held "primarily for sale in the ordinary course . . . of trade or business" is a question of fact arguably mixed with law, subject to the "clearly erroneous" standard of review).

To determine whether the ALJ applied the correct subsection of section 910 in computing decedent's average annual earnings, we must examine whether the employment in which decedent was engaged at the time of his injury was permanent and continuous, or seasonal and intermittent. *O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979, 980-81 (4th Cir. 1949). Courts must consider the type of job the worker held when he was injured, not his personal employment history. *Id.* Permanent and continuous job fall under subsections (a) or (b), whereas seasonal and intermittent jobs fall under (c). *Palacios v. Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980); *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 575 (7th Cir. 1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 754-55, 756 & n.3 (7th Cir. 1979);

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similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

O'Hearne v. Maryland Casualty Co., 177 F.2d at 980-81; *Marshall v. Andrew V. Mahony Co.*, 56 F.2d 74, 76-78 (9th Cir. 1932). Thus, for the ALJ to conclude, based on the decedent's employment history, that claimant's benefits should not be computed under either subsections (a) or (b) was error. We find, however, for the reasons set forth below that this was not a reversible error.

Assuming that decedent's job should have been classified permanent and continuous, whether the decedent was employed for "substantially the whole of the year" immediately preceding his injury determines which of subsections (a) or (b) should be applied. *Palacios v. Campbell Industries*, 633 F.2d at 842; *O'Hearne v. Maryland Casualty Co.*, 177 F.2d at 981-82; *see California Ship Service Co. v. Pillsbury*, 175 F.2d 873, 876 (9th Cir. 1949). *Compare* 33 U.S.C. § 910(a) ("if the injured employee shall have worked . . . during substantially the whole of the year") *with* 33 U.S.C. § 910(b) ("if the injured employee shall not have worked . . . during substantially the whole of the year"). Subsection (a) computes an average daily wage based on the claimant's actual employment history, whereas subsection (b) computes this figure using the hypothetical history of a typical worker engaged in similar employment in the same general locality. Subsection (b) applies to claims in which the injured worker has had too little time on the job to permit an accurate and fair computation of average daily wage: for example, the subsection would apply if a worker had been recently hired after having been unemployed, or out of the work force, or in a lower paying position. *See O'Hearne v. Maryland Casualty*, 177 F.d at 982; *California Ship Service Co. v. Pillsbury*, 175 F.2d at 876. In this case, the decedent has been on the job for several years, and the evidence in the record is sufficient to enable computation of his average daily wage based on his own employment record. Thus, the ALJ should have found that decedent worked "substantially

the whole of the year," and claimant's benefits initially should have been determined under subsection (a).

We find, however, that the ALJ's decision to compute claimant Freer's benefits under subsection (c) rather than subsection (a) should be affirmed because the decedent's actual employment history indicates that application of subsection (a) would provide excessive compensation. Because subsections (a) or (b) are premised on the injured employee having worked the entire year without injury, computation of benefits under either of these subsections for a worker in seasonal employment would result in overcompensation. *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d at 757-58; *O'Hearne v. Maryland Casualty Co.*, 177 F.2d at 981; *Marshall v. Andrew F. Mahony Co.*, 56 F.2d at 76-78. Similarly, the courts have held that even if the worker's employment is permanent and continuous, computation of the average annual wage must be determined pursuant to subsection (c) if (a) or (b) cannot "reasonably or fairly be implied." 33 U.S.C. § 910(c). *Palacios v. Campbell Industries*, 633 F.2d at 842; *National Steel & Shipbuilding*, *supra*, at 1291; *Marshall*, *supra*, at 76-78; *see Todd Shipyards v. Director (OWCP)*, 545 F.2d 1176, 1179 (9th Cir. 1976). This can occur when there is insufficient evidence in the record to enable the ALJ to make an accurate computation under subsections (a) or (b), *National Steel & Shipbuilding*, *supra* at 1291; *Todd Shipyards*, *supra*, at 1179, or when such computation results in excessive compensation of the claimant in light of the injured worker's actual employment record. *Johnson v. Britton*, 290 F.2d 355, 357-59, (D.C. Cir.), *cert. denied*, 368 U.S. 859 (1961); *Marshall*, *supra*, at 78 (dicta); *see Tri-State Terminals*, *supra*, at 756. Although both possibilities are present here, we affirm the use of section 910(c) based on our finding that computation of Freer's benefits under subsections (a) or (b) would result in overcompensation and we do not reach

the question of whether the evidence claimant introduced to show the earnings of a typical pile butt was insufficient.

Both subsections (a) and (b) compute the average annual wage of an employee working a five-day week by multiplying the worker's average daily wage by 260 (5 days a week x 52 weeks). Thus, if a claimant has worked less than 260 days in the year preceding his injury, he is overcompensated under subsection (a) or (b). When Congress amended section 910 of the Act in 1948 to reflect the five-day work week, it undoubtedly was aware that virtually no one in the country works every working day of every week; there are many reasons including illness, vacations, strikes, unemployment, family emergencies, etc. We can infer that Congress knew that both subsections (a) and (b) would result in some overcompensation, but retained the 260-day factor for administrative convenience. *See generally O'Hearne v. Maryland Casualty Co.*, 177 F.2d at 982. But in *Pillsbury v. Pacific Steamship Co.*, 56 F.2d 74, 78 (9th Cir. 1932), the court explained:

> [I]t is not reasonable or fair to apply subdivisions (a) or (b) when to do so would result in ascertaining a mere theoretical earning capacity, having no regard to the actual facts of the case, but which would award arbitrarily to an injured laborer disability compensation in excess of what he was able to earn if at work, as shown by earnings.

Johnson v. Britton, 290 F.2d at 359.

Subsection (c) provides greater flexibility in determining an injured employee's average annual earnings. Consideration must be given to the previous earnings of the injured worker at the job where the injury occurred, the previous earnings of other workers in the locality employed in similar jobs, and other employment of the injured worker. 33 U.S.C. § 910(c); *Palacios v. Campbell Industries*, 633 F.2d at 842; *National Steel and Shipbuilding Co. v. Bonner*, 600 F.2d at 1292. The ac-

tual wages earned by the employee are not conclusive. *Palacios, supra,* at 843; *National Steel and Shipbuilding, supra,* at 1292. "It is manifest that the prime objective of § 910(c) was to insure that compensation awards would be based on accurate assessments of the claimant's earning capacity." *Palacios, supra,* at 843, *citing Tri-State Terminals, Inc. v. Jesse,* 596 F.2d at 756.

We do not believe that Congress contemplated overcompensation as large as that which would result in this case if Freer's benefits were to be calculated under subsections (a) or (b). This is a question of line-drawing—when does the disparity between the claimant's actual days worked and the 260-day factor became so large that computation of the average annual wage under subsection (a) or (b) becomes unreasonable or unfair? If Freer's benefits are calculated under subsection (a), claimant receives benefits for sixty-five (or 33⅓ percent) more days than decedent actually worked. Because we find this disparity is large enough to justify application of subsection (c) in order to avoid excessive overcompensation of Freer, we uphold the ALJ's use of subsection (c).

V. EMPLOYER CONTRIBUTIONS TO PENSION AND HEALTH FUNDS

The Act defines wages to include:

> [T]he money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, *including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer,* and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13) (emphasis added). Claimant Freer urges that contributions to the union pension and health funds made by D-H on behalf of the decedent are within

the meaning of section 902(13) and should have been included in the ALJ's calculation of the decedent's average annual wage.[4]

The ALJ determined that these employer contributions are not wages under the Act. Under the collective bargaining agreement, D-H paid its contributions directly to the trust fund, not the individual employees, thus the ALJ reasoned that "[t]his payment, which by its nature is not capable of being converted to the immediate advantage of the employee, is not a 'similar advantage' to 'board, rent, housing, lodging' within the meaning of section 2(13)." C.T., Vol. I at 202. The BRB affirmed, stating that these benefits are too speculative to be included in an employee's wages because "the employee has no entitlement to these benefits." *Id.* at 6-7. The BRB cited its previous decisions in *Collins v. Todd Shipyards Corp.*, 5 BRBS 334, BRB No. 76-177 (Jan. 5, 1977) and *Hilyer v. Morrison-Knudsen Co.*, 6 BRBS 754, BRB No. 76-410 (Sept. 30, 1977), *rev'd*, 670 F.2d 208 (D.C. Cir. 1981), *petition for cert. filed sub nom. Morrison-Knudsen Construction Co. v. Director, (OWCP)*, No. 18-1891 (April 13, 1982). In *Hilyer*, the Director of the Office of Workers' Compensation Programs (Director) successfully argued before the court of appeals that employer contributions to union pension plans should be included in computing an injured employee's average wage. 670 F.2d at 211-13. Since that time, the Director has abandoned the position argued in *Hilyer* and now urges this court to hold that such payments are not wages. We do not find any of the Director's arguments for rejecting *Hilyer* persuasive.

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[4] D-H agreed to pay pension fund benefits in the following amounts for each hour that each covered employee worked or was paid for, whichever is greater: 80 cents for work performed until September 1, 1974; 85 cents for work from that date until April 1, 1975; $1.15 for work from that date until July 1, 1975; $1.23 for work performed thereafter.

The Director correctly argues that the court must consider the language of the statute, guided by the plain and ordinary meaning of the words Congress used. *Richards v. United States*, 369 U.S. 1, 9 (1961). But the Director insists we must apply a narrow definition of wages which excludes fringe benefits because when Congress enacted the statute in 1927 it would not have considered such benefits to be part of an employee's wages.[5] The Director further argues that only by congressional amendment could the Act's description of "wages" be expanded to include fringe benefits.[6] Although the concept of wages may have changed since 1927, we do not find that Congress intended an inflexible meaning of "wages" in the definition provided by section 902(13).[7] Examining the

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[5] The Director relies on the definition of "wages" provided in *Webster's New International Dictionary* 2863 (2d ed. 1957): "pay given for labor, usually manual or mechanical, at short intervals, as distinguished from salaries or fees." *Webster's* second edition, published originally in 1934, remained unchanged until the third edition, published in 1961. *See Webster's Third New International Dictionary* 6a, 7a (1961). In contrast the third edition states that "wages" often include "amounts paid by the employer for insurance, pension, hospitalization, and other benefits." *Id.* at 2569.

[6] The Director points to the legislative history of the 1964 amendment to section 1 of the Davis-Bacon Act, 40 U.S.C. § 276a(b), as indication that only by congressional amendment could the Act's definition of "wages" be expanded to include fringe benefits. While it is true that Congress' 1964 amendment defined wages to include employer contributions to trust funds, the Davis-Bacon Act is distinguishable because prior to the 1964 amendment, the statute did not provide any specific articulation of "wages." *See* Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494; Act of Aug. 30, 1935, c. 825, 49 Stat. 1011; Act of June 15, 1940, c. 373, § 1, 54 Stat. 399; Act of July 12, 1960, P.L. 86-624, § 26, 74 Stat. 418. Because Congress envisioned the inclusion of certain fringe benefits in its definition of "wages" under the LHWCA, we disagree with the Director's argument that new legislation is required to reflect modern concepts of wages.

[7] The Director contends that the Supreme Court's decision in *Potomac Electric Power Co. v. Director (OWCP)*, 449 U.S. 268

plain meaning of the language Congress used, we note that several fringe benefits were listed including "the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer . . . ." *Id.* This language indicates a flexible definition encompassing other fringe benefits not specifically mentioned by Congress that provide the employee with a "similar advantage." Moreover, the standard of liberal construction of the Act in favor of claimants suggests that Freer's broader interpretation of "wages" should be adopted to include employer contributions to health and pension plans. *See Voris v. Eikel*, 346 U.S. 328 (1953); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932).

We agree with the court's reasoning in *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d at 211-13, that the Act's definition of "wages" includes the values received from the employer that are easily identifiable and

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(1980) (*PEPCO*), supports the view that we must interpret the term "wages" according to the definition that was commonly accepted in 1927. We disagree.

In *PEPCO*, the court of appeals had held that computation of the employee's award under the Act's schedule benefit provisions was inappropriate because these provisions provided inadequate compensation for claimant's permanent partial disability. But the Supreme Court rejected computation under an alternative provision and reaffirmed the applicability of the Act's schedule benefit provisions as enacted in 1927 to determine the claimant's benefits. Although acknowledging the "recent trend" in workmen's compensation decisions away from the position that scheduled benefits are exclusive, the Supreme Court found such flexibility unsupported by the statute and inconsistent with Congress' intent. *Id.* at 276-80.

In the present appeal, we are not determining whether the provisions of section 902(13) should be ignored in light of more modern concepts of "wages" or decisions affording greater latitude. We are interpreting a definition of "wages" which by its terms provides some flexibility. Congress specifically listed several fringe benefits in its definition of wages and stated that other benefits providing "similar advantage" should also be considered. *See* 33 U.S.C. § 902(13).

calculable. Although not expressly mentioned in section 902(13), the BRB has included such values as vacation pay and overtime compensation within the Act's concept of "wages." *Id.* at 211. In *Hilyer*, employer contributions to benefit funds were found to be identifiable, calculable values and therefore included within "wages" under the LHWCA. *Id.*

The court in *Hilyer* attached little significance to the fact that the employer's contributions were made directly to the union benefit funds, not the employees, or that the employees exercised no control over the day-to-day management of the funds. The court found that these payments provided substantial economic value because if the employer did not provide health and pension benefits, the employees would have to spend their own money to acquire them. *Id.* at 211; *see W.W. Cross v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949). We agree that these contributions represent "an important part of the employees' total compensation, and an equally important part of the employer's labor costs." *Hilyer, supra*, at 212 n.7.

The Director argues that the Court's treatment of employer contributions in *United States v. Carter*, 353 U.S. 77 (1957), should not be interpreted to support claimant's position that the payments are wages under the Act. In *Carter*, the Court held employer contributions to a union benefit fund were part of the "sums justly due" to employees under the Miller Act, 40 U.S.C. §§ 270a *et seq.*[8] The surety in *Carter* argued that employer con-

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[8] Section 1(a)(2) of the Miller Act requires that before contracts above $2,000 are awarded for construction involving public buildings, the contractor must post a payment bond with a satisfactory surety "for the protection of all persons supplying labor and material." 40 U.S.C. § 270a(2).

Section 2(a) provides that "[e]very person who has furnished labor or material in the prosecution of the work provided for in the contract . . . and who has not been paid in full therefor . . . shall have the right to sue on such payment bond . . . for the *sum or sums justly due* him . . . ." 40 U.S.C. § 2706(a) (emphasis added).

tributions made directly to trust funds were not "wages" owing to the employees and that its obligation had been satisfied by payment of all "wages" owed to them. *Id.* at 217. The Court, however, construed the contributions to the health and pension funds to be part of the consideration that the employer agreed to pay its workers, *id.* at 217-18, despite the terms of the trust agreement which expressly stated that such payments were not to be considered "wages" due the employees. *Id.* at 214. Thus, contract provisions which purported to define pension fund contributions as something other than employee compensation did not stop the Court from finding the payments to be "sums justly due" the employees.

Applying a common sense approach, the Court in *Carter* reasoned that if the collective bargaining agreement had specified that the employer would pay each employee a certain amount above the prevailing wage, and if the employee had in turn contracted with his union to forward this amount to the pension fund, the contribution would be seen as part of the employee's compensation. *See id.* at 217; *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d at 212. Similarly, we conclude that the employer's payments in the present case should not be excluded from the computation of an employee's average weekly wage simply because D-H has eliminated two unnecessary steps by agreeing to pay the contributions directly to the union benefit funds. *Id.*

The Director relies on *United States v. Embassy Restaurant*, 359 U.S. 29 (1959), in which the Court determined that benefit fund contributions were not entitled to the priority given to "wages . . . due to workmen" under the Bankruptcy Act. Although acknowledging that unions bargain for these contributions as part of the employee's total wage package and that decisions under the National Labor Relations Act and the Social Security Act had treated various fringe benefits as "wages," the Court emphasized that its construction of

"wages . . . due to workmen" must be governed by the context of the Bankruptcy Act and by Congress' purpose in providing the priority. *Id.* at 33. The Court expressed concern that the protection afforded employees by the priority given to their wages might be weakened if the workers had to share their recovery with the benefits plan. *Id.* at 33-34. Thus, the Court construed "wages . . . due to workmen" narrowly and found that Congress did not intend to include other forms of compensation. *Id.* at 35. Here, by contrast, the LHWCA expressly includes several forms of compensation within its definition of "wages." *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d at 213. Moreover, in accordance with the Act's remedial purpose, we find that Congress intended to include all identifiable values provided to employees in the formula for computing "wages" received in return for their labor at the time of injury. *Id.*

In sum, we find that the contributions of D-H to the union benefit plans must be included in the computation of the decedent's average weekly wage. Accordingly, the portion of the BRB's decision concerning employer contributions is reversed and we remand to the BRB for the computation of claimant's benefits in a manner consistent with this holding.

The ruling of the Benefits Review Board is AFFIRMED in part, REVERSED in part, and REMANDED.

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No. 82-1991

In The

Supreme Court of the United States

October Term, 1982

Morrison-Knudsen Construction Company,

and

Argonaut Insurance Company,
Petitioners,

v.

Director, Office of Workers' Compensation Programs, United States Department of Labor,

and

Sonia Hilyer, Widow of James H. Hilyer,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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Petition for Certiorari Filed April 13, 1983
Certiorari Granted October 4, 1983

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DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1388

SONIA HILYER (Widow of James H. Hilyer),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY
and ARGONAUT INSURANCE COMPANY,
Respondents

PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

DATE	FILINGS—PROCEEDINGS
(B) 4- 9-80	4-Petitioner's petition for review of an order of the Benefits Review Board (m-8)
(B) 4- 9-80	Certified copy of petition for review was mailed to the BRB, Dept. of Labor & Richard W. Galiher, Esq.
(D) 4-25-80	Certified Index to Record (n-5)
(E) 5- 6-80	Clerk's order, sua sponte, that this case is consolidated with 80-1440
(T) 5-22-80	4-Petitioner's motion for permission to file deferred appendix, Rule 30(c) (m-21)
(C) 5-28-80	Clerk's order, sua sponte, consolidating Nos. 80-1388, 80-1440, 80-1504

DATE	FILINGS—PROCEEDINGS
(D) 6- 2-80	4-Motion of Directors, OWCP motion to establish a consolidated briefing schedule (m-29)
(E) 6- 4-80	Clerk's order granting the motion for leave to proceed under Rule 30(c)
(C) 6- 5-80	Clerk's order granting the motion to establish consolidated briefing schedule and the following schedule is set: June 30, 1980—Brief for petitioners Director, OWCP and Hilyer re average weekly wage determination July 30, 1980—Brief for respondents' Morrison-Knudsen and Argonaut in response, and for those parties as petitioners re attorneys' fee determination August 25, 1980—Reply brief, if any, for the Director and Hilyer, and for those parties in response re attorneys' fees Sept. 8, 1980—Reply brief (if any) re attorneys' fee
(C) 7- 7-80	4-Petitioner's (Sonia Hilyer) motion for leave to file brief, time having expired (m-7)
(C) 7- 7-80	7-Joint appendix (m-27)
(B) 07-14-80	Clerk's order granting the motion of petitioner's (Sonia Hilyer) for leave to file brief out of time, and the Clerk is directed to file lodged brief
(B) 07-14-80	15-Petitioner's (Sonia Hilyer) brief (m-7)
(T) 07-30-80	15-Brief of petitioners (Morrison-Knudsen Construction Co., et al) (m-30)
(T) 07-30-80	15-Brief of respondents (Morrison-Knudsen Construction Co., et al) (m-30)
(T) 07-30-80	10-Joint Appendix (II) (m-30)

DATE	FILINGS—PROCEEDINGS
(T) 08-27-80	15-Petitioner's (Hilyer) brief (m-25)
(T) 08-27-80	15-Petitioner's (Hilyer) reply brief (m-25)
(B) 03-13-81	Clerk's order, sua sponte, that the following times are allotted for the oral argument of these cases: Petitioner Director of the Office of Workers Compensation Programs—10 minutes; Respondents and cross petitioners —15 minutes; Cross respondent Hilyer (to argue the fee matter)—5 minutes. Argument should be heard in the above order.
(B) 03-19-81	Argued before Robinson and Robb*, CJ's; and Luther M. Swygert, CJ, USCA for the Seventh Circuit.
(S) 12-01-81	Opinion for the Court filed by Circuit Judge Swygert
(S) 12-01-81	Judgment that the order of the BRB is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with the opinion filed today
(V) 12-10-81	4-Petitioner's motion for allowance of appellate fee and appropriate stay of mandate (m-9)
(V) 12-14-81	1-Petitioner's bill of costs (m-11)
(V) 12-15-81	15-Respondents' petition for rehearing en banc and/or suggestion for rehearing en banc (m-15)
(V) 12-15-81	4-Respondents' opposition to petitioner's motion for allowance of appellate fee and bill of costs (m-15)
(V) 12-22-81	4-Petitioner's reply to respondents' opposition to petitioner's application for counsel fees (m-21)

DATE	FILINGS—PROCEEDINGS
(C) 12-30-81	4-Respondents' reply to petitioners' reply to respondents' opposition to petitioner's application for counsel fees (m-28) (OK, GF)
(B) 01-14-82	Per Curiam order that respondents/cross-petitioners' petition for rehearing is denied; CJ Robinson, Robb, CJ; and Luther M. Swygert, CJ, USCA for the Seventh Circuit
(B) 01-14-82	Per Curiam order, en banc, that respondents/cross-petitioners' suggestion for rehearing, en banc, is denied; CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJ's (CJ's MacKinnon, Wilkey and Ginsburg would granted rehearing, en banc)
(V) 01-18-82	4-Respondents' motion for stay of mandate pending of petition of certiorari to the Supreme Court of the United States (m-15)
(V) 01-25-82	4-Petitioner's opposition to motion for stay of mandate pending filing of petition for writ of certiorari (m-21)
(B) 02-23-82	Per Curiam order that the Clerk is directed to file respondents' lodged reply and enter same on the docket; and that respondents' motion for stay of mandate pending filing of petition of certiorari to the Supreme Court of the United States is granted for a period of thirty (30) days from the date of this order; CJ Robinson; Robb, CJ; and Swygert, SCJ, USCA for the Seventh Circuit
(B) 02-23-82	4-Respondents' reply to petitioner's opposition to motion to stay of mandate pending filing of petition for writ of certiorari (m-3)—filed per above order
(V) 03-16-82	4-Respondent's final motion to extend time for stay of mandate to 04/15/82 (m-12)

DATE	FILINGS—PROCEEDINGS
(V) 03-22-82	4-Petitioner's opposition to motion for additional stay of mandate (m-17)
(B) 03-26-82	Per Curiam order that the respondents' motion for further stay of the issuance of this Court's mandate is granted and the Clerk is directed not to issue the mandate in the cases prior to April 16, 1982; CJ Robinson; Robb, CJ; and Swygert, SCJ, USCA for the Seventh Circuit
(C) 04-16-82	Notice from Clerk, SC that petition for writ of certiorari was filed on April 13, 1982 in SC No. 81-1891

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1440

MORRISON-KNUDSEN CONSTRUCTION COMPANY and ARGONAUT INSURANCE COMPANY,
Petitioners

v.

SONIA HILYER (Widow of James H. Hilyer),
Respondent

PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

DATE	FILINGS—PROCEEDINGS
(B) 04-24-80	4-Petitioners' petition for review of an order of the Benefits Review Board (m-24)
(B) 04-28-80	Certified copy of petition for review was mailed to the Benefits Review Board, US Dept. of Labor & George S. Leonard
(E) 5-6-80	Clerk's order, sua sponte, that this case is consolidated with 80-1388
(T) 5-22-80	4-Petitioner's motion for permission to file deferred appendix, Rule 30(c) (m-21)
(C) 5-28-80	Clerk's order, sua sponte, consolidating Nos. 80-1388, 80-1440 & 80-1504
(D) 6-2-80	4-Motion of Directors, OWCP motion to establish a consolidated briefing schedule (m-29)
(E) 6-4-80	Clerk's order granting the motion for leave to proceed under Rule 30(c)
(C) 6-5-80	Clerk's order granting joint motion to establish consolidated briefing schedule and the following schedule is set:

DATE	FILINGS—PROCEEDINGS
	June 30, 1980—Brief for petitioners Director, OWCP and Hilyer re average weekly wage determination
	July 30, 1980—Brief for respondents' Morrison-Knudsen and Argonaut in response, and for those parties as petitioners re attorneys' fee determination
	August 25, 1980—Reply brief, if any for the Director and Hilyer, and for those parties in response re attorneys' fees
	Sept. 8, 1980—Reply brief (if any,) re attorneys' fee
(T) 6-13-80	Copy of Certified Index to Record (n-4)
(T) 07-30-80	15-Brief of petitioners (Morrison-Knudsen Construction Co., et al) (m-30)
(T) 07-30-80	15-Brief of respondents (Morrison-Knudsen Construction Co., et al) (m-30)
(T) 07-30-80	10-Joint Appendix (II) (m-30)
(T) 08-27-80	15-Brief of Sonia Hilyer (m-25)
(T) 08-27-80	15-Reply brief of Sonia Hilyer (m-25)
(B) 03-13-81	Clerk's order, sua sponte, that the following times are allotted for the oral argument of these cases: Petitioner Director of Office of Workers Compensation Programs—10 minutes; Respondents and cross petitioners—15 minutes; Cross respondent Hilyer (to argue the fee matter)—5 minutes. Argument should be heard in the above order.
(B) 03-19-81	Argued before Robinson and Robb*, CJ's; and Luther M. Swygert, CJ, USCA for the Seventh Circuit
(S) 12-01-81	Opinion for the Court filed by Circuit Judge Swygert

DATE	FILINGS—PROCEEDINGS
(S) 12-01-81	Judgment that the order of the BRB is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with the opinion filed today
(V) 12-10-81	4-Respondent's motion for allowance of appellate fee and appropriate stay of mandate (m-9)
(V) 12-14-81	1-Respondent's bill of costs (m-11)
(V) 12-15-81	15-Petitioners' petition for rehearing en banc and/or suggestion for rehearing en banc (m-15)
(V) 12-15-81	4-Petitioners' opposition to respondent's motion for allowance of appellate fee and bill of costs (m-15)
(V) 12-22-81	4-Respondent's reply to petitioners' opposition to respondent's application for counsel fees (m-21)
(C) 12-30-81	4-Petitioner's reply to respondent's reply to petitioners' opposition to respondent's application for counsel fees (m-28) (OK, GF)
(V) 01-18-82	4-Petitioners' motion for stay of mandate pending filing of petition of certiorari to the Supreme Court of the United States (m-15)
(V) 01-25-82	4-Respondent's opposition to motion for stay of mandate pending filing of petition for writ of certiorari (m-21)
(B) 02-23-82	Per Curiam order that the Clerk is directed to file respondents' lodged reply and enter same on the docket; and that respondents' motion for stay of mandate pending filing of petition of certiorari to the Supreme Court of the United States is granted for a period of thirty (30) days from the date of this order; CJ Robinson; Robb, CJ; and Swygert, SCJ, USCA for the Seventh Circuit.

DATE	FILINGS—PROCEEDINGS
(B) 02-23-82	4-Respondents' reply to petitioner's opposition to motion to stay of mandate pending filing of petition for writ of certiorari (m-3)—filed per above order
(V) 03-16-82	4-Petitioners' final motion to extend time for stay of mandate to 04/15/82 (m-12)
(V) 03-22-82	4-Respondent's opposition to motion for additional stay of mandate (m-17)
(B) 03-26-82	Per Curiam order that respondents' motion for further stay of the issuance of this Court's mandate is granted and the Clerk is directed not to issue the mandate in the cases prior to April 16, 1982; CJ Robinson; Robb, CJ; and Swygert, SCJ, USCA for the Seventh Circuit
(C) 04-16-82	Notice from Clerk, SC that petition for writ of certiorari was filed in SC No. 81-1891 on April 13, 1982

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1504

DIRECTOR, OFFICE OF WORKERS' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY
and ARGONAUT INSURANCE COMPANY,
Respondents

PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

DATE	FILINGS—PROCEEDINGS
(B) 05-12-80	4-Petitioner's petition for review of an order of the Benefits Review Board (m-8)
(B) 05-13-80	Certified copy of petition for review was mailed to the BRB, Dept. of Labor, George S. Leonard & Richard W. Galiher
(C) 5-28-80	Clerk's order, sua sponte, consolidating Nos. 30-1388, 80-1440 & 80-1504
(D) 6-2-80	4-Petitioner's joint motion to establish a consolidated briefing schedule (m-29)
(E) 6-4-80	Clerk's order granting the motion to proceed under Rule 30(c)
(T) 6-13-80	Copy of Certified Index to Record (n-4)
(C) 7-7-80	7-Joint appendix (m-27)
(C) 7-7-80	15-Petitioner's (Director) brief (m-27)
(T) 07-30-80	15-Brief of petitioners (Morrison-Knudsen Construction Co., et al.) (m-30)
(T) 07-30-80	15-Brief of respondents (Morrison-Knudsen Construction Co., et al.) (m-30)

DATE	FILINGS—PROCEEDINGS
(T) 07-30-80	10-Joint Appendix (II) (m-30)
(T) 08-27-80	15-Brief of Sonia Hilyer (m-25)
(T) 08-27-80	15-Reply brief of Sonia Hilyer (m-25)
(B) 03-13-81	Clerk's order, sua sponte, that the following times are allotted for the oral argument of these cases: Petitioner Director of Office of Workers Compensation Programs—10 minutes; Respondents and cross petitioners—15 minutes; Cross respondent Hilyer (to argue the fee matter)—5 minutes. Argument should be heard in the above order.
(B) 03-19-81	Argued before Robinson and Robb *, CJ's; and Luther M. Swygert, CJ, USCA for the Seventh Circuit
(S) 12-01-81	Opinion for the Court filed by Circuit Judge Swygert
(S) 12-01-81	Judgment that the order of the BRB is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with the opinion filed today
(V) 12-15-81	15-Respondents' petition for rehearing en banc and/or suggestion for rehearing en banc (m-15)
(V) 01-18-82	4-Respondents' motion for stay of mandate pending filing of petition of certiorari to the Supreme Court of the United States (m-15)
(B) 02-23-82	Per Curiam order that the Clerk is directed to file respondents' lodged reply and enter same on the docket; and that respondents' motion for stay of mandate pending filing of petition of certiorari to the Supreme Court of the United States is granted for a period of thirty (30) days from the date of this order; CJ Robinson; Robb, CJ; and Swygert, SCJ, USCA for the Seventh Circuit

DATE	FILINGS—PROCEEDINGS
(B) 02-23-82	4-Respondents' reply to petitioner's opposition to motion to stay of mandate pending filing of petition for writ of certiorari (m-3)—filed per above order
(V) 03-16-82	4-Respondents' final motion to extend time for stay of mandate to 04/15/82 (m-12)
(B) 03-26-82	Per Curiam order that respondents' motion for further stay of the issuance of this Court's mandate is granted and the Clerk is directed not to issue the mandate in the cases prior to April 16, 1982; CJ Robinson; Robb, CJ; and Swygert, SCJ, USCA for the Seventh Circuit
(C) 04-16-82	Notice from Clerk, SC that petition for writ of certiorari was filed In SC No. 81-1891 on April 13, 1982

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1388 and 80-1504

SONIA HILYER

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Petitioners-Cross-respondents

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents-Cross-petitioners

ON PETITION FOR REVIEW OF AN ORDER OF
THE BENEFITS REVIEW BOARD

JOINT APPENDIX I

CA# 80-1388: SONIA HILYER, Petitioner v. MORRISON-KNUDSEN CONSTRUCTION COMPANY and ARGONAUT INSURANCE COMPANY, Respondents (Case No. 76-DCWC-158) (OWCP No. 40-82056) (BRB No. 78-568)

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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 76-DCWC-158
OWCP No. 40-82056

IN THE MATTER OF:

JAMES H. HILYER (Deceased),
Claimant

against

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
Employer

Room 700
Vanguard Building
1111 - 20th Street, N.W.
Washington, D.C.

Thursday,
July 1, 1976

9:30 a.m.

BEFORE:

DAVID PELKEY
Administrative Law Judge

APPEARANCES:

On behalf of Claimant:

GEORGE STEPHEN LEONARD, ESQUIRE
Leonard, Glammer & Flues
1019 - 19th Street, N.W.
Washington, D.C. 20036

On behalf of Employer:

RICHARD W. GALIHER, ESQUIRE
1215 - 19th Street, N.W.
Washington, D.C. 20036

* * * *

[36] JUDGE PELKEY: If we are going to go off the record for the purposes of framing a stipulation on matters that can be admitted, while we are on the record I want to find out, for the purposes of this hearing, those stipulations, once entered into record will be considered binding on the parties, they will be considered as treating the matters with which they deal as not in issue, and stipulations will represent the items stipulated can be incorporated in formal findings of fact by me.

Making those stipulations of record will be considered eliminating the need to present evidence to establish those items or to support them.

A stipulation as to those items will be considered as conclusively establishing their validity as facts. I want you to understand how we are going to treat stipulations, once they are entered into and made of record. Is that acceptable?

MR. LEONARD: That is acceptable.

MR. GALIHER: Yes, Your Honor.

* * * *

[37] JUDGE PELKEY: * * *

Admission of these items as stipulation is to be governed by the statement I made before we went off the record. For the record at this point, the following items are stipulated as items to be admitted as facts.

One, on April 19, 1974, James H. Hilyer was regularly employed by Employer as a laborer, and performed assigned duties in the District of Columbia. On that same date, Employer, in the usual course of business carried on employment in the District.

On that same date, while performing assigned duties at the time and place designated for such performance, James H. Hilyer sustained an injury.

Two, as a result of the April 19, 1974 injury, James H. Hilyer expired on April 21, 1974.

Three, at the time of the death of James H. Hilyer, Sonia Hilyer was living with him as his wife.

Four, at the time of James H. Hilyer's death, he and Sonia Hilyer were parents of two minor sons; namely, James H. Hilyer, Jr., born November 30, 1966; and Bryan M. Hilyer, born May 7, 1970.

Five, as a result of James H. Hilyer's death, death benefits have been paid to the widow and the minor children [38] under the law, since April 20, 1974. That those payments have been based on an average weekly wage of $205.92 and they have totaled $137.28 per week paid.

Have I accurately stated the stipulation, gentlemen?

MR. LEONARD: Yes.

MR. GALIHER: Yes, Your Honor.

MR. LEONARD: With one possible exception, Your Honor. Are you stating the average weekly wage of $205.92 on which the payments were based, that that be indicated to be the Employer's calculation.

The point is, you are here to determine average weekly wage.

JUDGE PELKEY: Would you stipulate that as the Employer's calculation of average weekly wage?

MR. GALIHER: Pursuant to the Act, yes, Your Honor.

JUDGE PELKEY: It is stipulated that the $205.92 weekly wage amount represents Employer's computation thereof in its understanding of the requirements of the Act. Is that all right?

MR. GALIHER: Yes, Your Honor.

JUDGE PELKEY: There is one thing, as far as I see it, I indicated in the stipulation that these death benefits have been paid since April 20, 1974. I notice we say Mr. Hilyer died April 21.

[39] MR. LEONARD: Yes, Your Honor. Injury payments were due on the twentieth, which was a Saturday in any event, and he died the next day.

JUDGE PELKEY: Were death benefits paid from the twentieth?

MR. GALIHER: Yes, sir.

* * * *

[44] PAUL BUTTS

having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEONARD:

Q Would you please state your name and home address for the record.

A My name is Paul Butts, 4427 Arnold Road, Suitland, Maryland, Apartment 104.

Q What is your employment, Mr. Butts?

A I am Business Agent with Local 456.

JUDGE PELKEY: What union?

THE WITNESS: Local 456, Laborer's Local 456.

JUDGE PELKEY: What is the union? What is the name of the union?

THE WITNESS: Highway and Heavy Construction.

MR. LEONARD: I ask at this time that Claimant's Exhibit 5, Mr. Butt's identification card, or what purports to be, be marked for identification only.

(Whereupon, the document referred to was marked as Claimant's Exhibit 5 for identification.)

BY MR. LEONARD:

Q Mr. Butts, I show you Claimant's Exhibit 5, and ask you to identify that?

A This is one of the cards representing who I am.

Q Does that correctly describe your employment?

A Yes, sir, it does.

[45] MR. LEONARD: I will offer Claimant's Exhibit 5 in evidence.

MR. GALIHER: No objection.

JUDGE PELKEY: Claimant's Exhibit 5 is admitted.

(Whereupon, the document referred to, having previously been marked as Claimant's Exhibit 5, was received in evidence.)

BY MR. LEONARD:

Q I show you, at this time, Claimant's Exhibit 4 and ask you if you can identify that?

A Yes, sir. This is what we refer to as a union card or a union book. Once a member has joined a local and is working on a job, after he has paid his initiation fee, he receives one of these.

Q Looking at that, what does it show as to the membership of James Hilyer in your union?

A For this card here, for the year 1974, he was a member in good standing with dues paid up through April.

Q How about 1973?

A Yes, sir, November and December. The last of 1973 and starting in January 1974.

Q I show you at this time Claimant's Exhibit 3 in evidence and ask you if you have seen one of those before?

A Yes, sir. This is the agreement that was in effect [46] at the time of Mr. Hilyer's death. It is a contract.

Q Was it in effect for the year prior to that?

A Yes, this was May 1, 1972 to April 30, 1975.

Q Did that apply to all employees of Morrison-Knudsen who were employees of the union?

A Yes, sir.

Q I show you at this time Claimant's Exhibits 1 and 2 and ask you if you have ever seen anything like that before?

A Yes, sir. I have seen these quite a few times from Morrison-Knudsen. They are pay stubs, they come with checks each week, totaling the number of hours, and supposed to total the hourly rate.

Q What information do they contain?

A It gives the total—

MR. GALIHER: Your Honor, I believe the document speaks for itself. It has been admitted into evidence. I don't think we have to reiterate it.

JUDGE PELKEY: I agree with you.

BY MR. LEONARD:

Q Are union dues paid on a fixed or hourly basis?

A If you are talking about regular dues, we have a $6.00 a month regular union dues.

Q As to the union dues which are shown on Claimant's Exhibits 1 and 2, are they the regular union dues or are they other types of dues and if so, what?

[47] A These are other type dues. They are like administrative dues for health and welfare, pension and so forth.

Q Are they based on a monthly basis or hourly basis?

A Hourly basis.

Q What is the amount of the dues?

A They are $4.00.

Q What is the amount per hour?

A I would have to refresh my memory on this because it goes back to a contract which is not now in effect, on the old contract.

Q I call your attention to Claimant's Exhibit 1, which say $4.00, Claimant's Exhibit 2 says $5.50 for 56 hours. Does that indicate a rate to you or does it refresh your recollection?

A Yes, sir. That would have been ten cents on the hour.

Q Does the union then keep the record of the amount of these dues paid by its various laboring members working for Morrison-Knudsen?

MR. GALIHER: To the union?

MR. LEONARD: To the union.

THE WITNESS: We have what we call per capita, each member is listed on that.

JUDGE PELKEY: What did you describe it as?

THE WITNESS: A per capita, each member is listed [48] on months and so forth.

BY MR. LEONARD:

Q Your record of dues paid to the union would show the number of hours that each man has worked?

A Yes, sir, that would be on it.

MR. LEONARD: I ask to have this marked as Claimant's Exhibit 6.

(Whereupon, the document was marked as Claimant's Exhibit 6 for identification.)

BY MR. LEONARD:

Q Mr. Butts, I show you Claimant's Exhibit 6 and ask you to identify it.

A Yes, sir, it is a Laborer's District Council Working Dues Fund. It gives the members name, social security number, hours reported for the month and so on.

Q For all employers or one particular employer?

A No, the District Council should have one of these for all companies.

Q Taking Claimant's Exhibit 6 as an example, is that for any specific employer?

A This here?

Q Yes.

A No, sir.

JUDGE PELKEY: You say that is not for any [49] particular employer?

THE WITNESS: It should be for all employers.

BY MR. LEONARD:

Q On page 1, what is the firm name given there?

A Morrison-Knudsen Company, Incorporated, 1725 Eye Street, N.W., Suite 610.

Q Would you say the names attached to it are for all employers or just Morrison-Knudsen?

A On here it is just Morrison-Knudsen. It should be just the laborers on here to my knowledge.

Q Each of those laborers is paid in accordance with Claimant's Exhibit 3, the wage agreement?

A Yes, sir.

MR. GALIHER: Objection, move to strike. I don't think he can testify what each of the employees is paid. He can testify what his records show, but the question that was asked, to which he answered is much too broad.

MR. LEONARD: Each of the persons—

JUDGE PELKEY: I thing the position is well taken. Do you want to clarify that?

MR. LEONARD: Surely.

BY MR. LEONARD:

Q With respect to each of the persons named on those lists of the employees of Morrison-Knudsen?

A Yes, sir.

[50] Q Are they members of the union?

A Yes, sir, and they are supposed to be.

Q Does the union supervise their payment by Morrison-Knudsen?

A Only if there is a mistake in the pay or they are underpaid or are not getting paid the right rate per hour.

Q How is that rate established?

A That is negotiated between the Contractor's Association and the unions when a new contract is drawn up.

Q Is that the contract referred to as Claimant's Exhibit 3?

A Yes, sir.

Q To what extent does the union supervise the payment of the amounts stated in Claimant's Exhibit 5 to these people?

A I can't explain exactly how this is all worked out. I am not on none of the council's or anything like that, the Trustee Boards that work all of these out. All of this is negotiated when the contracts are drawn up and I am not in on the meetings on the contracts.

Q Let me put it this way, the contract—Claimant's Exhibit 3 is the contract between the union and Morrison-Knudsen?

A Yes, sir.

Q Each of the persons on your list are persons who were, in fact, members of the Laborer's Union and were [51] working for Morrison-Knudsen?

A Yes, sir.

Q The lists you have in Claimant's Exhibit 6 show the number of hours worked each month by each of such employees?

A Yes, sir.

Q That is 1974, do you have these same records for 1973?

A They should be the same records, stating the same facts and everything like that.

Q Could they be produced to the Court if required?

A I don't see any reason why they couldn't.

JUDGE PELKEY: The answer is yes?

THE WITNESS: Yes.

BY MR. LEONARD:

Q Under the contract between Morrison-Knudsen and the union, Mr. Butts, does the union maintain trust funds for various purposes?

A Yes, sir.

Q Does Morrison-Knudsen pay into those trust funds under the agreement?

A Yes, sir.

Q Are the amounts of those payments set out in the agreement?

A Yes, sir.

Q Are those for the benefit of the employees or [52] benefit of the union?

MR. GALIHER: Objection. The contract, which is in evidence, speaks for itself. If he wants to testify what his understanding is from a union standpoint, he can do it. But, again, I believe the contract does speak for itself.

JUDGE PELKEY: The question is—
MR. LEONARD: I will withdraw the question.

BY MR. LEONARD:

Q Does the union, in fact, pay pensions to their employees under the Pension Plan?
A Yes, sir.
Q Does it pay health and welfare benefits to the employees?
A Yes, sir.
Q Are the charges made to the employer, to the best of your knowledge, charges based upon the hours they worked?
A Would you repeat that again?
Q Are the charges made to the employer—In other words, that the employer pays to the union—are they based on the number of hours your members worked?
A Yes, sir.
Q Are there three such funds in the union; one for pension, one for health and welfare and one for training?
A Yes, sir.
Q The amounts paid by the employer, in each case, are [53] as designated by the contract?
A Yes, sir.
Q The benefits of those flow to the employees or members of your union?
A Yes, sir.
MR. GALIHER: Objection. I am not sure he can say benefits flow to the members of the union.

Judge John O'Malley has previously ruled, on March 9, 1976, in the case of Collins versus Todd Shipyard Corporation and Traveler's Insurance Company, BRP Service 17 ALJ, I believe it is number 4, that employer's contribution to a health and welfare fund and a pension fund are not properly includable in computations of the average weekly wage.

They are not includable, they are not payments to the employee and the employee has vested right in those funds

only if he becomes ill or injured on the job or is eligible for a retirement pension. I believe that is specifically what the contract says.

JUDGE PELKEY: You are objecting to the question?

MR. GALIHER: I am just objecting to the question and the answer. The document speaks for itself.

JUDGE PELKEY: The objection is sustained.

MR. GALIHER: Could I move to strike the answer so the record may be complete?

[54] JUDGE PELKEY: You may move, I will deny it.

MR. LEONARD: I open at this time Claimant's Exhibit 7, the Union Pension Plan.

(Whereupon, the document referred to was marked Claimant's Exhibit 7 for identification.)

MR. GALIHER: I object. There has been no foundation laid for this documents use.

JUDGE PELKEY: He hasn't tendered it yet.

BY MR. LEONARD:

Q I show you Claimant's Exhibit 7, and ask you if you recognize that?

A This is the Laborer's Pension Plan. It covers various things for accidents and what is covered, different types.

Q Who is covered by it?

A Laborers.

Q When you mean laborers, you mean members of your union?

A Yes.

Q That includes the Claimant in this case?

A Yes, sir.

Q How is the Pension Plan funded?

A It is Trust Fund 3. There are trustees on the funds to administer.

[55] Q Where does the money come from?

A The money for these funds, the benefits, so much on the hour is paid into the funds and administered down.

Q By whom?

A The companies on the employees.

MR. LEONARD: I offer the Union Pension Plan at this time.

MR. GALIHER: I will let it in.

JUDGE PELKEY: I beg your pardon?

MR. GALIHER: No objection.

JUDGE PELKEY: Claimant's Exhibit 7 is admitted.

(Whereupon, the document referred to, having previously been marked as Claimant's Exhibit 7, was received in evidence.)

JUDGE PELKEY: I think he is still on Direct Examination of the witness.

MR. GALIHER: I want to withdraw my previous remark and put my objection of record. The reason is to be consistent with my position. I refer again to the Court decision I cited to the Court. I am just not sure pension plans are relevant to the determination of average weekly wage.

JUDGE PELKEY: By not objecting to the admission of the Exhibit, you are not agreeing, as a matter of law, that the benefits therein are mentioned in that Exhibit, constitute [56] evidence of an average weekly wage.

MR. GALIHER: I want to make sure that is understood for the record.

JUDGE PELKEY: The record so reflects.

BY MR. LEONARD:

Q Mr. Butts, of your personal knowledge, were you employed by the union between April 19, 1973 and April, 1974?

A I was trying to think exactly the time I started. That should have been just about the time or maybe a

little bit after. I have been a member for several years; I am referring as a Business Agent.

Q Were there laborers who worked from April 1973 to April 1974 or more?

A Yes, sir.

MR. LEONARD: That is all I have. Thank you very much, Mr. Butts.

CROSS EXAMINATION

BY MR. GALIHER:

Q You have indicated, referring to Exhibit 6 that is in front of you, that this is apparently a computer print-out of the names of laborers and monthly periods showing the names of the laborers that were working for Morrison-Knudsen during that month, and what hours they worked and the amount of money, the ten cents, is what? This is paid by the employer under this contract to the union for what fund was it?

[57] A Your trust fund number 3—The Health and Welfare Pension would be trust fund number 3.

Q Is this the only payment the union receives from Morrison-Knudsen for these laborers?

A I would have to go back in the contract to refresh on that.

Q Of your own personal knowledge, is this the only payment you know of that the union receives from Morrison-Knudsen?

MR. LEONARD: I object as irrelevant. The contract speaks for itself.

JUDGE PELKEY: Overruled.

BY MR. GALIHER:

Q Is it?

A You have several things in there paid by the employer in the contract.

JUDGE PELKEY: Is your answer you don't know?

THE WITNESS: This is not the only—

JUDGE PELKEY: Your answer is that is not the only payment?

THE WITNESS: No, sir.

BY MR. GALIHER:

Q Who drafted this contract?

A That is drawn up between the Contractor's Association and the members of our Local Laborer's International.

[58] Q The Contract Association of which Morrison-Knudsen is a signatory to that agreement, is that right?

A Yes, sir, that is right.

Q Who is the author of this? I notice you are the organizer and founder of the union, do you know who is the author of this book? Who wrote the contracts for the union?

A I am organizer and Business Agent, not the founder.

Q Do you know who wrote this book?

A That particular book there, no, sir.

Q Do you know how it came into being or anything like that?

A I wasn't at any of the meetings, no, sir.

Q You have indicated a man who is a member of the Laborer's Union—he has to be a member of the Laborer's Union in order to work for Morrison-Knudsen on this project?

A He is supposed to be, yes.

JUDGE PELKEY: You say this project, I don't know what you are talking about.

MR. GALIHER: The subway project. This was where Mr. Hilyer was working at the time.

THE WITNESS: If he was a laborer he was supposed to be a member of Local 456 to work on the job, yes.

BY MR. GALIHER:

Q When he is hired by Morrison-Knudsen, how is that handled? Is he sent out from the union hall?

[59] A He can be sent out from a union hall if the company calls in for men or the company has a request, and using a letter he can bring it to the hall, to the agent covering the job and get a clearance in that way.

Q Do you know anything personally about Mr. Hilyer?

A No, sir.

Q Does the employee himself contribute anything to any of those funds?

A You mean straight out of his pocket?

Q Yes.

A Like reach back and take it out?

Q Yes.

A No, sir. Except his monthly dues, $6.00, which he pays himself. That is the only thing.

Q But they don't go into those funds? The dues don't go into those funds, the dues are separate?

A Yes, this is to keep him a member in good standing.

Q So the dues are to have the card, to be a union employee and to work on a union job?

A Yes, sir.

Q Apart from that, out of the employer's pocket the employer pays the funds you have mentioned to the Health and Welfare Funds, right?

A Yes, it is right in the back of the contract there.

Q At the time an employee pays his union dues, as I [60] understand it, all he gets for his $6.00 is to be a member of the union and to work on a union job? I want to clarify that.

A By being a member, he works on a union job, true. If he is not a member on a union job, he can't work on it, if he is a laborer and what we are talking about now. But along with his $6.00 a month he has representation, if, by any reason, he is laid off or fired for an unjust cause—

Q He has grievance procedures which are within the contract?

A Yes.

Q Beyond that this employee doesn't have any right, does he, to tell your union how to administer those funds?

A Just a regular laborer would not be telling the Local how to administer the funds, no, sir.

Q In this instance, a regular laborer does not have any control really, of how funds paid into these different pension plans and so forth are used?

A He might not, unless he has read a copy of the contract. Then he would know how it was to be paid in, what was supposed to be paid by hour and so forth.

Q Practically speaking, he doesn't have any right to tell the union what to do with that money, right?

A If something is brought up in one of the union meetings or something like this, one of the members can make a suggestion on something of this matter.

[61] Q Does the employee—Do the payments in that fund go directly from the employer, that would be Morrison-Knudsen, to the union?

A They go to the funds. They are paid into the funds, they are not paid to us.

Q They are never paid to the employee, are they?

A To the employee?

Q That is right.

A No, sir.

* * * *

REDIRECT EXAMINATION

BY MR. LEONARD:

Q Who are the beneficiaries of the funds?

MR. GALIHER: Objection.

JUDGE PELKEY: Do you know?

THE WITNESS: I could not give you all of the names, no, sir.

BY MR. LEONARD:

Q Who is the beneficiary of the pension plan, Claimant's Exhibit 7?

A Pete Ellis, Leroy Adams—

Q Who are the beneficiaries who get the benefits?

A The wives. I misunderstood, I am sorry.

Q What about injured employees, do they get them?

A Injured employees, they still get them.

[62] Q Your pension fund is for members of the union?

A Members and his dependents.

Q Same thing for Health and Welfare?

A Yes, sir.

Q Same thing for Training Fund?

A That would be basically for the member himself on Training.

Q It is still for the member?

A For the member, yes.

Q So, what the employer pays to the union for each of these funds, is a payment for the benefit of the employee?

MR. GALIHER: Objection.

JUDGE PELKEY: Do you know?

THE WITNESS: I said, yes, sir.

MR. GALIHER: Move to strike.

JUDGE PELKEY: Overruled.

* * * *

Plaintiffs Exhibit No. 1 7/1/76 E.J.

MORRISON - KNUDSEN COMPANY, INC.

DETACH AND RETAIN

THIS IS A STATEMENT OF YOUR EARNINGS AND DEDUCTIONS AS REPORTED TO FEDERAL AND STATE GOVERNMENTS

PR 541/73

J. HILYER						158-34-3706	016608	021274
25880		25880	3446	1514	1		1208	19712
64700	400			25880		VIRGINIA TAX		808
						UNION-DUES		400

[redacted]

BASE HOURLY RATE	STRAIGHT TIME		FIT	SOCIAL SECURITY	STATE INCOME TAX	OTHER DEDUCTIONS	AMOUNT

PLAINTIFFS EXHIBIT NO. 1

PLAINTIFF'S EXHIBIT NO. 3

WAGE AGREEMENT

Laborers' District Council of
Washington, D.C.
and Vicinity

Affiliated with

Laborers' International Union
of North America, AFL-CIO

[EMBLEM]

Subway and Rapid Transit
Agreement

May 1, 1972 to April 30, 1975

Local Union 456
3712 12th Street, N.E.
Washington, D.C.
Phone: 635-8508-9

[Union Label]

WORKING AGREEMENT

FOREWORD

This Agreement is entered into May 1, 1972, by and between the Construction Contractors Council, Inc., 1515 Wilson Boulevard, Arlington, Virginia, Suite 804 acting on behalf of its members and the members of the Master Builders' Association and individual employers signatory to this Agreement, herein referred to as parties of the first part or Employers, and the Laborers' District Council of Washington, D.C., and Vicinity, acting on behalf of Local Unions affiliated with this District Council, herein referred to as the party of the second part or Union, for the purpose of establishing harmonious relations and facilitating peaceful adjustment of wage schedules and working conditions and for preventing strikes and lockouts and establishing a peaceful method for adjustment of grievances and disputes which may from time to time arise between the contracting parties.

The work covered by this Agreement shall be all of the work under the jurisdiction of the Laborers' International Union of North America, AFL-CIO, contracted by the Washington Metropolitan Area Transit Authority or its successor organization, within the territory covered by the Laborers' District Council of Washington, D.C., and Vicinity.

WITNESSETH: Principles upon which this Agreement is based: All parties hereto adopt the following Articles as the basis for their joint working rules and operation of the Joint Arbitration Board as hereinafter provided for.

• • • •

Health and Welfare

Section 5. The parties hereto agree to continue to operate the Health and Welfare Fund known as Laborers' District Council Trust Fund No. 3 for the benefit of the

employees covered by this collective bargaining agreement. The Employers agree to pay to such fund an amount equal to twenty-eight cents ($.28) per hour from May 1, 1972 to April 30, 1975, for all hours worked by employees who are covered by this Agreement in accordance with the terms of the Health and Welfare Trust Agreement in effect between the parties. Such payments shall be calculated on all hours worked by employees subsequent to May 1, 1972. Any changes in benefits resulting from such increased payments into such Fund shall be determined by the Board of Trustees. Failure to make payments to the Fund shall be in violation of this Agreement.

Each party will delegate four (4) trustees to administer the Fund. The trustees shall use the payments to the Fund for the benefit of the Subway and Rapid Transit Laborers, their families and dependents, for medical, dental, and/or hospital care, compensation for injuries, and/or illness resulting from occupational activity, or for unemployment benefits, or for the purchase of insurance covering life and accidental death, accident disability benefits, hospitalization, surgical, medical and sickness benefits. All of these benefits above outlined or any other type of health and welfare benefits may, in the discretion of the trustees, be paid directly from the Fund either from principal or income, or both, to the Subway and Rapid Transit Laborers, their families and dependents.

Notwithstanding the termination date of this collective bargaining agreement, it is understood by all parties to this Agreement that the above-mentioned health and welfare provisions will remain in full force and effect up to and including April 30, 1975, as per agreement.

Pension

Section 6. Parties hereto agree to continue to operate the Pension and Disability (a disability and pension) Fund known as Laborers' District Council Trust Fund

No. 3 Pension and Disability established January 1, 1959, for the benefit of the employees covered by this collective bargaining agreement. The employers shall pay such fund twenty-five cents ($.25) per hour for all hours worked by employees from May 1, 1972 through April 30, 1973, and thirty-five cents ($.35) per hour for all hours worked by employees from May 1, 1973 through April 30, 1974, and forty cents ($.40) per hour for all hours worked by employees on and after May 1, 1974.

Such payments shall be calculated on all hours worked by employees subsequent to May 1, 1972. Any changes in benefits resulting from such increased payments into such Fund shall be determined by the trustees. Failure to make payments to the Fund shall be a violation of this Agreement.

Each party will delegate four (4) trustees to administer the Fund. The trustees shall use the payments to the Fund for Subway and Rapid Transit Laborers, and their families and shall cover all disability and pension benefits as may in the discretion of the trustees be agreed upon and incorporated in an appropriate trust agreement or agreements and Pension and Disability Plan.

Section 7. It is further agreed that the Union shall have the right to declare this Agreement terminated as to any Employer who fails to make payments into the health and welfare fund or into the pension fund, or in any manner fails to abide by the terms of the Trust Agreement governing Laborers' District Council Health and Welfare Trust Fund No. 3 or the terms of the Trust Agreement governing Laborers' District Council Pension and Disability Trust Fund No. 3, upon giving such Employer forty-eight (48) hours' written notice to that effect. A copy of such notice shall also be served on the Construction Contractors Council.

Section 8. Parties to this Agreement hereby agree that all sub-contractors employed by them on any job shall

secure a bond in the form required by the respective Boards of Trustees of the Health and Welfare and the Pension and Disability Funds or shall provide a cash deposit in the amount which is satisfactory to the respective Boards of Trustees of such funds. In the event that a sub-contractor fails to secure said bond or to make said deposit, then the employers agree that they shall be responsible for the full and prompt payment by said subcontractors to the said Welfare and Pension Funds as required under this Agreement.

Section 9. The parties hereto agree to establish and operate a Training Fund for the purpose of insuring adequate trained manpower to perform the work covered by this collective bargaining agreement. The employers agree to pay to such fund commencing May 1, 1972, an amount equal to five cents ($0.05) per hour for all hours worked by employees on and after May 1, 1972, in accordance with the terms of the Training Fund Trust Agreement to be executed by the parties hereto prior to November 1, 1969.

• • • •

CONSTRUCTION CONTRACTORS COUNCIL, INC.

1515 Wilson Boulevard
Suite 804
Arlington, Va. 22209

MEMBERSHIP LIST

Amber Drilling Co.
American Construction Co., Inc.
Anning-Johnson Co., Inc.
Anchor Associates, Inc.
Atlas Machine & Iron Works
Gordon H. Ball, Inc.
Ball-Shea-Norair Joint Venture
J. W. Bateson Co., Inc.
Bell-Air Compressor Rental Co.
Frank Briscoe Company, Inc.
M. J. Byorick, Inc.
The Ceco Corporation
M. Cladny Construction Co., Inc.
Coe Construction, Inc.
Commercial Carpentry Corporation
Corning Construction, Inc.
Crane Rental Company, Inc.
Crane Service Company, Inc.
Edward M. Crough, Inc.
Dravo Corporation
Fred Drew Company, Inc.
Franki Foundation Company
Edward B. Friel, Inc.
George A. Fuller Company
Gilles & Cotting, Inc.
John C. Grimberg Co., Inc.
John H. Hampshire, Inc.
The Head Construction Company
Healy-Kruse Joint Venture
Hutchison Brothers Excavating Co., Inc.
The George Hyman Construction Co.

Anthony J. Izzo, Jr. Company
A. F. Jorss Iron Works
John B. Kelly, Inc.
Peter Kiewit Sons' Company
The Law Company
Kirk Lindsey, Inc.
Kirk Lindsey Construction Co., Inc.
William P. Lipscomb Co., Inc.
N. Litterio & Company, Inc.
Mark Masonry Co., Inc.
George C. Martin, Inc.
The Maritime Company
Massman-Kiewit-Early Joint Venture
Morauer & Hartzell, Inc.
Morrison-Knudsen Company, Inc.
Moses-Ecco Company, Inc.
McDermott Associates, Inc.
McKinney Drilling Company
McLeod & Romborg Stone Co., Inc.
Norair Engineering Corp.
Olsen Woodwork Co., Inc.
Arnold Parreco & Haass, Inc.
Palisades Construction Corp.
Pick Masonry Company
Potomac Iron Works, Inc.
Potts & Callahan, Inc.
Prospect Industries, Inc.
Raymond International, Inc.
Charles H. Riddle Company
Rivers & Bryan, Inc.
C. J. Roberts Reinforcing Steel Co.
Schnable Foundation Company
J. F. Shea Co., Inc.
Skinker & Garrett, Inc.
Slattery Associates, Inc.
Spencer, White & Prentis, Inc.
Star Carpentry Corporation
Steele & Moroney, Inc.

Stromberg Sheet Metal Works, Inc.
R. M. Thornton, Inc.
S. M. Traylor Brothers, Joint Venture
Heron Todd Steel Construction Co.
Chas. H. Tompkins Company
Walter Truland Corporation
Turner Construction Company
Underground Construction Co., Inc.
Underwater Advisors Engineering Corp.
Utley-James, Inc.
The Volpe Construction Co., Inc.
Washington Air Compressor Rental Co.
Williams Enterprises

PLAINTIFF'S EXHIBIT NO. 7

[I 'cture Omitted in Printing]

March 1972

Trust Fund No. 3 Plan
Amendment Effective January 1, 1973

Article V—Amount of Benefits

The multiplier of years of Current Credited Service is changed from $12 to $15. The maximum monthly benefit is $400. (See page 20)

Same changes on page 6 of question and answer section.

[Picture Omitted in Printing]

Laborers' District Council Pension and
Disability Trust Funds

TRUST FUND CONSULTANTS, INC.
821 - 15th Street, N.W.
Room 428
Washington, D.C. 20005

Phone 347-1841

ADMINISTRATORS
CONSULTANTS
ACTUARIES
EMPLOYEE BENEFIT PLANS

Fourth Revision

Includes All Amendments
To July 1, 1971

DEAR BROTHERS:

Not too many years ago, and surely within the lifetime of nearly all of our members, the idea that someday Laborers would receive pension checks to help support them in their later years would have been dismissed as unrealistic. Yet today this dream has become a reality and the true and great worth of your Union has again been demonstrated.

The Plan and the benefits which it prescribes are the product of many days of meetings and discussions in which your Officers and Representatives participated in full measure and with a single-minded purpose, namely, to secure for the membership the greatest benefits for the greatest number under a financially sound plan. We are satisfied that we have done just that.

Your Officers of the Laborers' District Council and your Representatives on the Board of Trustees of the Pension Funds look with pride upon the Plan set forth in this pamphlet. Within the limits of the financial resources available as a result of collective bargaining, the Plan represents the best it is possible to devise. Indeed, on the basis of available information concerning other Laborers' pension plans throughout the country, this Plan provides greater benefits than any other based on the same or comparable employer contributions.

We are not so satisfied or complacent, however, as to think that it can never be improved. This Plan, like other programs in which the Union is vitally interested, must be constantly re-examined in the light of changing conditions in the economy and developments in the construction industry.

It is our sincere wish that our brethren who have retired under the Plan may long continue to receive pension checks earned for their many years of devoted serv-

ice to their Union and to the construction industry in the Washington metropolitan area.

Fraternally yours,

LABORERS' DISTRICT COUNCIL OF WASHINGTON, D.C., AND VICINITY

Francis L. Greenfield,
President

Robert L. Glenn,
Secretary-Treasurer

TO ALL EMPLOYEES
COVERED BY THE FUNDS:

This booklet has been prepared on behalf of the Boards of Trustees to tell you about the Pension Plan and what it means to you. It contains a complete text of the Plan (starting on page 11) and answers to most of the questions which might arise.

The Pension and Disability Trust Funds are governed by Boards of Trustees, composed of equal numbers of Union and Management representatives. The money collected by the Funds is contributed by your employer as provided in his Agreement with the Union. It can be used only for benefits as shown in the Plan and for necessary administrative expenses. Once a year, the Trustees will submit a financial statement to the United States Government, covering all income, benefits and expenditures.

We urge you to study this booklet carefully so you will be fully aware of the benefits to which you may be entitled. A report showing the credits you have earned will be available each year on or about July 1 at the Fund Office. You should come in and pick it up so you can check your record. If you think it is not correct, bring your payroll slips to the Fund Office where your claim can be investigated. You must do this before October 1 each year.

We are pleased that it has been possible to increase the benefits and provide you with this additional security for your retirement.

YOUR BOARDS OF TRUSTEES

January 1972

QUESTIONS AND ANSWERS

WHO IS COVERED?

[Picture Omitted in Printing]

The plans cover all laborers who work for contributing employers within the jurisdiction of the Laborers' District Council of Washington, D.C. who make payments to a Fund. Of course, each laborer must have worked to earn enough credits to make him eligible.

HOW DO I EARN CREDITS?

There are two kinds of credit—Past Service Credit and Current Credited Service.

PAST SERVICE CREDITS were given to those who worked under the health and welfare trust funds during the five year period before the pension plans began. The past service period for the No. 2 Plan is 1954 through 1958; the No. 3 Plan 1952 through 1956; the Plumbers Laborers Plan 1953 through 1958. Each 400 hours reported and paid for to the health and welfare funds equals ¼ credit. Your total credits in these five years multiplied by 4 equals your Past Service Credit. The maximum Past Service Credit allowed is twenty (20).

CURRENT CREDITED SERVICE is working credit and is based on actual hours worked as reported and paid for to a Pension Fund each calendar year. Each 200 hours so reported equals ⅛ credit, but the maximum a man can earn in one year is 1 credit.

WHAT HAPPENS IF I CHANGE FROM ONE KIND OF LABORERS' WORK TO ANOTHER?

All the credits you earn under any of the Laborers' Funds within the jurisdiction of the Laborers' District Council of Washington, D.C. and Vicinity will count towards your pension. They will be added together.

WHAT HAPPENS TO MY CREDITS IF I STOP WORKING FOR A CONTRIBUTING EMPLOYER?

If you work less than 200 hours a year for contributing employers for an extended period, you can lose your credits. You will lose your credit if you have:

less than 2 credits and have 1 year with under 200 hours;

2 to 5 credits and have 2 years with under 200 hours;

5 to 10 credits and have 3 years with under 200 hours;

10 to 20 credits and have 4 years with under 200 hours.

If you do not work and earn credits for 4 years, you will lose all your previous credits,

EXCEPT:

When you have accumulated 10 credits of Current Credited Service—working credits—you cannot lose them even if you do no more work under the plan, provided you are 40 years old or more, but you will have to wait until you retire (after age 55 years) to get your pension.

WHAT IS VESTING?

Vesting means that you cannot lose your credits. When you have accumulated 10 credits of Current Credited Services—10 working credits—your rights in this plan will be vested, provided you are at least 40 years old.

HOW CAN I TELL IF I AM ELIGIBLE FOR A PENSION?

[Picture Omitted in Printing]

1. You must be at least 55 years old, and you must show proof of birth.
2. You must have Current Credited Service (Working credit) as follows:

To retire at age	Current Credited Service
55	17 or more
56	16
57	15
58	14
59	13
60	12
61	11
62 or over	10

HOW CAN I TELL WHAT MY MONTHLY PENSION WILL BE?

The amount of your pension will depend on the fund or funds in which you have earned your credit.

Fund No. 2:

(1) Multiply Past Service Credit by $5.00

(2) Multiply Current Credited Service by $8.00.

The sum of (1) and (2) is your monthly pension.

The minimum monthly pension is $45; the maximum is $228.

Fund No. 3:

(1) Multiply Past Service Credit by $6.00

(2) Multiply Current Credited Service by $15.00

The sum of (1) and (2) is your monthly pension.

The minimum monthly pension is $45; the maximum is $400.

Plumbers' Laborers:

Your total credit is multiplied by $5.00.

There are options which pay benefits to your beneficiary after your death. See page 7 for details.

IS MY MONTHLY PENSION AFFECTED BY MY SOCIAL SECURITY PENSION?

No. Your monthly pension is in addition to your Social Security Pension.

HOW DO I APPLY FOR A PENSION?

1. Contact the Fund Office at least a month before you plan to retire.
2. Bring with you a document establishing your age—such as birth certificate, baptismal certificate, census record, medicare card.
3. If you have already received a letter from the Social Security administration advising you that you are entitled to Social Security benefits, bring it with you.
4. If you are still working and approaching age 72, get in touch with the Fund Office at least a month before your 72nd birthday.

PROVING YOUR AGE

If you don't have a birth certificate among your papers, we suggest that you try to obtain one promptly and put it away for safekeeping. This will avoid delay when you file for Social Security benefits and your pension.

Other documents which can be used to establish age are baptismal certificates, census reports, old family Bibles and school records.

MAY MY WIFE RECEIVE ANY PENSION BENEFITS?

Yes. Once you have qualified for a pension, there are three options from which you may choose to take care of her. You may select any of the three following plans INSTEAD of your regular pension, but you must do this in writing at least one year prior to your date of retirement.

1. Seventy percent of your regular pension payable to you for life. After your death, your wife would receive the same benefit for the remainder of her life. (This will be 1% lower for each year your wife is younger than you, or 1% higher for each year she is older, up to a maximum of 15%).

2. Eighty-five percent of your regular pension payable to you for life. After your death, your wife would receive half that amount for the remainder of her life. (This will be 1% lower for each year your wife is younger than you, or 1% higher for each year she is older, up to a maximum of 10%.)

3. Ninety percent of your regular pension, paid to you for the rest of your life. Should you die before 10 years, a beneficiary designated by you would continue to receive the pension for the rest of the 10-year period. (This will be 1½% lower for each year or part of a year you retire after your 62nd birthday.)

Inquire at the Fund Office regarding these benefits in your particular case.

MAY ANYONE OTHER THAN MY WIFE RECEIVE ANY OF MY PENSION BENEFITS?

Yes. Under either Option 1 or 2 above, you may substitute a dependent sister or brother of approximately equal age. In Option 3, you may name anyone you wish as your beneficiary.

MAY I WORK AND EARN ADDITIONAL CREDIT AFTER BEGINNING TO RECEIVE MY PENSION?

After beginning to receive your pension benefit you may work at the calling in the industry on jobs of Employers who have working agreements with the Laborers' District Council only so long as such earnings do not exceed the Social Security maximum for retired persons who continue to receive their full Social Security benefits. If your earnings from such work at calling in the industry exceed such Social Security maximum, your pension benefit will stop immediately. However, these hours will not constitute additional credit nor an increase in your pension benefit.

WHAT HAPPENS IF I DIE BEFORE I QUALIFY FOR A PENSION?

Your beneficiary is entitled to receive a lump sum death benefit in the amount of $1,000 if you are a participating employee in the Plan at the time of death and have accrued at least one (1) year of Current Credited Service under the Plan.

WHAT HAPPENS IF I DIE AFTER I QUALIFY FOR A PENSION BUT BEFORE I BEGIN TO RECEIVE ONE?

If, at the time of your death, you were 55 or older, eligible for a pension, but had not retired, your beneficiary would be entitled to a lump sum death benefit in the amount of $1,000 and an additional benefit equal in amount to the sum of 36 months of your retirement benefits.

WHAT HAPPENS IF I DIE A SHORT TIME AFTER I BEGIN TO RECEIVE MY PENSION?

If you die less than three years after beginning to receive your pension, your beneficiary would receive a lump sum death benefit in the amount of $1,000 and an additional

benefit equal in amount to the sum of 36 months of your retirement benefit less the sum already paid in retirement benefits.

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WHAT HAPPENS IF I BECOME DISABLED BEFORE I REACH RETIREMENT AGE?

If you are totally and permanently disabled, and have ten (10) years of Current Credited Service, you will be eligible for a disability benefit.

WHAT IS MEANT BY TOTAL AND PERMANENT DISABILITY?

Total and permanent disability means that you can never again work for pay or profit.

DOES IT MAKE ANY DIFFERENCE HOW I BECOME DISABLED?

Yes. You will not qualify if your disability is due to any of the following:

1. Engaging in a criminal activity.
2. Habitual drunkenness or the use of narcotics.
3. Self-inflicted injury.

HOW CAN I TELL WHAT MY DISABILITY PENSION WILL BE?

If a man qualifies for disability benefits, he computes his disability pension in the same manner as he would his regular pension.

WHAT HAPPENS TO MY CREDITS WHILE I AM IN MILITARY SERVICE?

Immediately upon entering service, you should notify the Fund in writing of the date of your induction. If you do this, any credits you have will be held for you.

[Picture Omitted in Printing]

IF I MOVE OR OTHERWISE LEAVE THE PLAN WILL I RECEIVE MY BENEFITS?

No. If you leave the Plan before you qualify for retirement, or before your rights have vested, you will receive no benefits or payment.

[Picture Omitted in Printing]

HOW DO I FIND OUT HOW MANY CREDITS I HAVE?

Each year a report will be prepared showing your total credits to date. This report will be available at the Fund office on or about July 1 of each year. You should come in and get it or it will be mailed to you on request.

WHAT CAN I DO IF I THINK I HAVE NOT BEEN GIVEN ALL THE CREDIT I EARNED?

[Picture Omitted in Printing]

If you think your record is not correct, come to the Fund Office before October 1. Bring with you information to help us check your claim. It is very important that you keep all your income tax forms and payroll slips for at least two years. If you do not question your record of credits before October 1, the records will be considered correct as shown on the report.

[Picture Omitted in Printing]

CAN THE BENEFITS BE CHANGED?

Yes. The Board of Trustees has the authority to change the benefits.

MAY I ASSIGN MY RIGHTS UNDER THIS PLAN?

No assignment or transfer of payments is permitted.

These questions and answers cover, in a general manner, the most important provisions of the Plan. Nothing in this explanation is intended to in any way change the full details of the Plan. Further information may be secured by inquiring at the Fund Office. The full text of the Pension and Disability Plan No. 2 follows.

Plan No. 3 and the Plumbers' Laborers' Plans differ only with respect to the effective dates, the dates the plans started paying pensions, the date on which Past Service Credit is based, and the value of each credit in computing pensions. These differences are shown at the end of the Plan.

LABORERS' DISTRICT COUNCIL
PENSION AND DISABILITY
TRUST FUND NO. 2

PENSION AND DISABILITY PLAN

ARTICLE I.—Definitions

The meaning of all words and phrases used in this Plan shall be that defined in, or derived from the context of, the Trust Agreement, unless a different meaning is clearly indicated by the context herein.

Section 1—Plan, or Pension and Disability Plan

The terms "Plan" or "Pension and Disability Plan" means the Laborers District Council Pension and Disability Trust Fund No. 2, Pension and Disability Plan, embodied herein, as defined in Article I, Section 5, of the Trust Agreement.

Sec. 2—Union

The term "Union" means the Laborers District Council of Washington, D.C., and Vicinity.

Sec. 3—Employer

The term "Employer" means the Construction Contractors Council of Washington, D.C.

Sec. 4—Individual Employer

The term "individual employer" means any employer, as defined in Article I, Section 2, of the Trust Agreement, who is required by a collective bargaining agreement as defined in Article I, Section 1, the Trust Agreement, to make payment to the Fund, as defined in Article I, Section 4, of the Trust Agreement.

Sec. 5—Employee

The term "employee" means any employee as defined in Article I, Section 3, of the Trust Agreement.

Sec. 6—Agreement or Trust Agreement

The terms "Agreement" or "Trust Agreement" mean the Agreement and Declaration of Trust establishing the Laborers' District Council Pension and Disability Trust Fund No. 2, and as revised, amended or modified.

Sec. 7—Fund or Trust Fund

The terms "Fund" or "Trust Fund" mean the Fund or Trust Fund as defined in Article I, Section 4, of the Trust Agreement.

Sec. 8—Trustees or Board or Board of Trustees

The terms "Trustees" or "Board" or "Board of Trustees" mean the Trustees as defined in Article I, Section 9, of the Trust Agreement.

Sec. 9—Effective Date

The effective date of the Plan shall mean January 1, 1959.

Sec. 10—Anniversary Date

The anniversary date of the Plan shall mean January 1 of each year during the operation of the Plan.

ARTICLE II--Administration

Section 1—Board of Trustees

The Board of Trustees shall have the powers and shall perform the functions set forth in the Trust Agreement.

Sec. 2—Delegation of Authority

This Plan shall be administered by the Administrator selected by the Board of Trustees. The Board of Trustees, by resolution, may delegate to the Administrator such powers and duties as may be necessary or desirable in order to relieve the Board of Trustees of the details of supervision and management.

ARTICLE III—Determination of Service

Section 1—Credited Service

Credited Service shall consist of the total of Past Credited Service and Current Credited Service computed as of December 31 of each calendar year. Past Credited Service shall be limited to the calendar years of 1954 through 1958 multiplied by 4 and shall consist of employment in the industry as reported, prior to January 1, 1960, to the Laborers' District Council Trust Fund No. 2, or such other Laborers' Trust Fund or Funds as may be specified, participating in the Plan, in units of one-quarter (1/4) year and multiples thereof, for each such calendar year. Current Credited Service shall consist of employment in the industry during each calendar year beginning January 1, 1959, as reported to the Laborers' District Council Pension and Disability Trust Fund No. 2, or such other Laborers' Trust Fund or Funds as may be specified, and for which payments have been made into the Fund, in units of one-quarter (1/4) year and multiples thereof for the period between January 1, 1959, and December 31, 1969, and in units of one-eighth (1/8) year and multiples thereof for the period subsequent to January 1, 1970. Current Credited Service may be earned by or be credited to an employee after his normal retirement date or disability date provided, however, that actual retirement shall be considered to have occurred no later than as of the seventy-second (72nd) birthday. Current Credited Service shall be determined in accordance with the following schedule:

(a) Between January 1, 1959 and December 31, 1969

Reported Employment or Service During a Calendar Year	Current Credited Service
1,600 or more hours	1 year
1,200 to 1,600 hours	¾ year
800 to 1,200 hours	½ year
400 to 800 hours	¼ year
Less than 400 hours	None

(b) Subsequent to January 1, 1970

Reported Employment or Service During a Calendar Year	Current Credited Service
1,600 or more hours	1 year
1,400 to 1,600 hours	⅞ year
1,200 to 1,400 hours	¾ year
1,000 to 1,200 hours	⅝ year
800 to 1,000 hours	½ year
600 to 800 hours	⅜ year
400 to 600 hours	¼ year
200 to 400 hours	⅛ year
Less than 200 hours	None

Sec. 2—Termination of Participation

Participation by an employee in this Plan and all Credited Service previously accumulated shall be terminated if the employee has not qualified for Vested Benefits, has not become a pensioner and has earned no Credited Service for a period in accordance with the following table:

Credited Service Previously Accumulated	Period During Which No Service Credit Earned
Less than 2 years service credit	1 calendar year
2 to 5 years service credit	2 calendar years
5 to 10 years service credit	3 calendar years
10 to 20 years service credit	4 calendar years

Time of service in the Armed Forces of the United States shall be excluded from the period during which no service credit was earned.

Since employees may be covered by more than one pension and disability plan negotiated on their behalf by the Laborers' District Council of Washington, D.C., and Vicinity, for the purpose only of determining termination of participation in this Plan the total of Credited Service in all such plans shall be used in the foregoing table as Credited Service previously accumulated.

Sec. 3—Vesting

An employee is eligible for Deferred Vested Retirement benefits commencing on his normal retirement date if he terminates his participation after having attained age forty (40) and completed at least ten (10) years of Current Credited Service. (The Normal Retirement Benefit commencement date is determined from the table in Article IV, Section 1, and depends on the number of years of accrued Current Credited Service.) Any employee who has accumulated a total of ten (10) years or more of Current Credited Service in two or more pension and disability plans negotiated by the Laborers' District Council of Washington, D.C., and Vicinity and shall have reached age forty (40) shall not have his Credited Service in either or any of such Plans terminated under any conditions or circumstances whatsoever, prior to his normal retirement date. When such employee has attained his normal retirement date and the employee has filed an application for retirement benefits which shall be no later than as of his seventy-second (72nd) birthday, he shall

receive from each Plan in which he has accumulated Credited Service that pension to which he may be entitled based on the total Credited Service in each such Plan. Vested rights shall not be terminated under any conditions or circumstances whatsoever except as set forth under Section 2 of Article VII herein.

ARTICLE IV—Qualifications for Pensions

Section 1—Conditions for Age Retirement Benefit

An employee is eligible for Normal Retirement Benefits on the first of the month following satisfaction of the following age and Current Credited Service conditions:

Age	Years of Current Credited Service
55	17 or more
56	16
57	15
58	14
59	13
60	12
61	11
62 or over	10

Sec. 2—Conditions for Total and Permanent Disability

On or after January 1, 1970, an employee is eligible for Total and Permanent Disability Retirement benefits, commencing on the date of disability determination, if he should become totally and permanently disabled through some unavoidable cause after having completed at least ten (10) years of Current Credited Service. Such employee shall be deemed to be totally and permanently disabled if he has been totally and permanently disabled by bodily injury or disease so as to be prevented thereby

from engaging in any occupation or employment for remuneration or profit and, in the opinion of a qualified physician, such total disability will be permanent and continuous for the remainder of his life. Such disability shall be deemed to have resulted from an unavoidable cause, unless it (1) was contracted, suffered, or incurred while such person was engaged in, or resulted from his having engaged in, a criminal enterprise, or (2) resulted from his habitual drunkenness or the use of narcotics, or (3) resulted from self-inflicted injury.

Sec. 3—Application for Benefits

Each application for benefits under the Plan shall be made in writing on a form provided by the Board of Trustees and shall be filed no later than within three (3) years of his seventy-second (72nd) birthday which is the latest actual retirement date available to him. If the application is not so made within this three-year period, the participant shall be ineligible for benefits, and his rights under the Plan shall be forfeited unless the Trustees unanimously agree that the participant was unable to file the application through no fault of his own and then filed the application without undue delay. The Board of Trustees may require any applicant for benefits or any person receiving benefits under the Plan to furnish to it such information as in its discretion it shall require.

ARTICLE V—Amount of Benefits

Section 1—Age Retirement Benefit and Total and Permanent Disability Benefit

The monthly amount of age retirement benefit granted an employee eligible for such benefit under the provisions of Article IV, Section 1, or of total and permanent disability benefit granted an employee eligible for such under the provision of Article IV, Section 2, shall be equal to the product of four and 50/100 dollars ($4.50) and the number of years of past credited service plus the product

of eight dollars ($8.00) and the number of years of current credited service of such employee at his normal age retirement date, disability date or actual retirement date but no later than as of his seventy-second (72nd) birthday, as the case may be from a minimum of forty-five ($45.00) up to a maximum of two hundred twenty-eight dollars ($228.00) per month. Effective January 1, 1972, the monthly benefit for an eligible employee will be increased from four dollars and fifty cents ($4.50) multiplied by the number of years of past credited service to five dollars ($5.00) multiplied by the number of years of past credited service plus the product of eight dollars ($8.00) and the number of years of current credited service. Benefits shall commence the first (1st) day of the next calendar month after the filing of proper application and after all conditions of the applicable sections shall have been met, and shall continue for three years certain and life thereafter.

Sec. 2—Period of Payment of Age Retirement Benefit and Total and Permanent Disability Benefit

Subject to the other provisions of this Plan, the payment of an age retirement benefit or of a total and permanent disability benefit shall commence as of the first (1st) day of the next calendar month after the completed application for benefits has been filed and after all conditions of the applicable sections shall have been satisfied, and shall be paid on the first (1st) day of each and every calendar month thereafter for life.

There shall be paid on behalf of an employee who, at the time of his death, was eligible for an age retirement benefit under Article IV, Section 1, but who had not filed for such age retirement benefit, a lump sum death benefit of $1,000 and an additional benefit equal in amount to the sum of thirty-six months of such retirement benefit for which he was eligible, provided, however, that if he had filed for such age retirement benefit but had not received

thirty-six months of such retirement benefit, there shall be paid a death benefit equal in amount to the sum of thirty-six months of such age retirement benefit less the sum of any such age retirement benefits paid. If there is no beneficiary designated by the eligible member or surviving the death of the eligible member to receive such death benefit, payment will be made to the first surviving class of the following classes of successive preference beneficiaries: (a) widow or widower, (b) surviving children, (c) surviving parents, (d) surviving brothers and sisters, (e) executors or administrators.

With respect to a totally disabled employee receiving a total and permanent disability benefit, the Board of Trustees reserves the right to request or to obtain evidence satisfactory to it that such employee continues to be totally disabled. If such evidence is not provided to the Board of Trustees or cannot be obtained by it, the Board of Trustees may assume that such employee is no longer totally disabled and he shall no longer be eligible for a total and permanent disability benefit under this Plan. If an employee who had received a total and permanent disability benefit under this Plan should no longer be eligible for such benefit for any reason, the period during which he did not work as a result of such disability shall not be counted in the period of service for the computation of an age retirement benefit or any subsequent total and permanent disability benefit.

Sec. 3—Joint and Survivorship Benefit

An employee who expects to qualify for an age retirement benefit under Article IV, Section 1, may elect, in writing on an approved form filed with the Trustees at least one year prior to his normal retirement date, to receive, in lieu of benefits for three years certain and life thereafter only, Option (A), a joint and survivorship benefit payable monthly so long as he and his designated joint annuitant shall live, or, Option (B) a joint and

survivorship benefit payable monthly so long as he shall live and thereafter, in one-half (½) that monthly amount, so long as his designated joint annuitant shall live.

The joint and survivorship benefit under Option (A) shall be seventy percent (70%) of the monthly age retirement benefit for the employee eligible for such benefit and for his designated joint annuitant of equal age. The percentage shall be decreased by one percent (1%) for each year, or part thereof, by which the designated joint annuitant is younger than the employee eligible for such benefit, and shall be increased by one percent (1%) for each year, or part thereof, (not to exceed fifteen percent (15%)), by which the designated joint annuitant is older than the employee eligible for such benefit.

The joint and survivorship benefit under Option (B) shall be eighty-five percent (85%) of the monthly age retirement benefit for the employee eligible for such benefit, so long as he shall live, and thereafter shall be one-half (½) that monthly joint and survivorship benefit for his designated joint annuitant of equal age. The percentage shall be decreased by one percent (1%) for each year or part thereof, by which the designated joint annuitant is younger than the employee eligible for such benefit, and shall be increased by one percent (1%) for each year, or part thereof, (not to exceed ten percent (10%)), by which the designated joint annuitant is older than the employee eligible for such benefit.

The option shall be null and void if the designated joint annuitant dies prior to the employee's filing of a completed application for benefits under Article IV, Section 3. Additionally, if the employee elects an option but dies prior to filing a completed application for benefits under Article IV, Section 3, the designated joint annuitant shall receive no joint and survivorship benefit.

Sec. 4—Ten Year Certain Benefit

An employee who expects to qualify for a Normal Retirement benefit may elect, at least one year prior to his normal retirement date, to receive in lieu of benefits for three years certain and life thereafter only, a ten year certain benefit payable so long as he shall live but for not less than ten years. The monthly benefit payable for ten years certain and life thereafter shall be 90% of the three year certain and lifetime only benefit, but this percentage shall be decreased by 1½% for each year, or part thereof, by which the employee retires after his 62nd birthday. If the employee elects the option but dies prior to filing a completed application, the option shall be null and void.

In the event that the employee shall die after he qualifies for an age retirement benefit under Article IV, Section 1, but prior to the filing of a completed application for benefits under Article IV, Section 3, the employee's election of the ten year certain benefit shall become inoperative.

Sec. 5—Death Benefit

The beneficiary of any pensioner or deferred vested pensioner or of any participating employee who at the time of his death has at least one (1) year of Current Credited Service, shall be paid a Lump Sum Death Benefit in the amount of One Thousand Dollars ($1,000.00).

If there is no beneficiary designated by the eligible member or surviving the death of the eligible member to receive such death benefit, payment will be made to the first surviving class of the following classes of successive preference beneficiaries: (a) widow or widower, (b) surviving children, (c) surviving parents, (d) surviving brothers and sisters, (e) executors or administrators.

ARTICLE VI—Contribution to Trust Fund

Section 1—Individual Employer's Payments

Each individual employer shall pay to the Trustees for deposit in the Trust Fund, pursuant to the provisions of the Trust Agreement, such amounts with respect to its employees and under such conditions as provided in the collective bargaining agreements. Full and prompt payment by an individual employer of such amounts to the Trustees shall constitute a complete discharge of the individual employer's financial obligations under the Plan.

Sec. 2—Trust Fund

The Trust Fund created by the Trust Agreement and implemented by the individual employer's payments and the investment return thereon shall be held by the Trustees and administered in accordance with the provisions of the Trust Agreement. Neither the Trustees, Employer, nor the individual employers, either as a Committee or as individuals, in any manner guarantee the Trust Fund from loss or depreciation. All payments of benefits, as provided in the Plan, shall be made solely out of the Trust Fund and neither the Trustees, Employer, nor the individual employers, either as a Committee or as individuals, shall be in any manner liable therefor.

ARTICLE VII—Amendment-Termination

Section 1—Amendment

The provisions of the Plan may be amended or modified at any time, and from time to time, by mutual agreement of the Employer and the Union, but no such action shall contravene the terms of any collective bargaining agreement then in effect nor shall operate to permit any part of the assets of the Trust Fund to be used, or diverted, to purposes other than for the exclusive benefit of the employees or retired employees, or their dependents. Any modifications, alterations, or amendments required by

the Internal Revenue Code for the purposes of approval of the Plan under Section 4.01(a) of the Internal Revenue Code may be made retroactive and shall be accomplished by the Parties—the Employer and the Union.

Sec. 2—Termination

In the event of any final termination of the Plan, service shall not accrue thereafter on behalf of any employees, and after the payment of all reasonable expenses, taxes or proper charges, the funds then in trust shall be allocated by the Trustees for the benefit of each employee in the following manner, and in the following order, to the extent of the sufficiency of such funds, basing such allocations on such rates and tables as recommended, by the Administrator and approved by the Trustees:

a. An amount shall be allocated with respect to each employee retired for age or total disability equal to the actuarial reserve for his accrued benefits;

b. An amount shall be allocated with respect to each employee whose rights shall have vested under the provisions of Section 3 of Article III herein equal to the actuarial reserve for his accrued benefits;

c. An amount shall be allocated with respect to each remaining employee who shall have at least five (5) years of credited service, the amount so allocated to be equal to the actuarial reserve for his accrued benefits at the date of termination of the Plan.

d. If the funds to be allocated are sufficient to accommodate some but not all of the requirements of one of these categories (having accommodated all of the categories preceding), the remaining funds shall be divided pro-rata among all of the participants in the category for which funds are insufficient.

The allocations referred to above, when determined by the Administrator and the trustees, shall be applied for the benefit of each such employee ei-

ther by a cash payment, by the purchase of an annuity or retirement annuity contract from one or more insurance companies, or may be implemented through the continuance of the then existing Trust or through a new trust or trusts for that purpose, or by a combination of these media, as the Trustees shall determine.

e. After satisfaction of the liabilities of a, b and c above, any remaining monies shall be used to increase the termination benefits, determined above, in a proportionate manner.

ARTICLE VIII—Appeals Procedure

Section 1—Appeals

Any employee, any applicant for benefits or any person receiving benefits under this Plan adversely affected by any action or ruling by the Board of Trustees shall not be deemed to have exhausted his administrative remedies until he submits to the Board of Trustees an appeal containing a full statement of each and every reason urged for reversal or modification of such action or ruling and the Board of Trustees acts thereon.

Plan No. 2 started paying pensions on January 1, 1964.

Laborers' District Council Pension and Disability Trust Fund No. 3

The Laborers' District Council Pension and Disability Trust Fund No. 3 is identical to the preceding Plan except for the following:

1. Article I, Section 3—Effective Date

   The effective date of Plan No. 3 shall mean May 1, 1957.

2. Article III, Section 1—Credited Service

Past Credited Service for Plan No. 3 shall be limited to the calendar years 1952 through 1956.

Current Credited Service shall consist of employment in the Industry during each calendar year beginning May 1, 1957 as reported to the Laborers' District Council Pension and Disability Trust Fund No. 3, or such other Laborers' Trust Fund or Funds as may be specified, and for which payments have been made into the Fund, in units of one-quarter (¼) year and multiples thereof for the period between May 1, 1957 and December 31, 1969 and in units of one-eighth (⅛) year and multiples thereof for the period subsequent to January 1, 1970.

3. Article V—Amount of Benefits

The monthly retirement benefit shall be Six Dollars ($6.00) multiplied by the employee's years of Past Service Credit plus ($15.00) multiplied by the employee's years of Current Credited Service.

Plan No. 3 started paying pensions on January 1, 1962.

Plumbers' Laborers' Pension and
Disability Trust Fund Plan

The Plumbers' Laborers' Pension and Disability Trust Fund Plan is identical to the preceding Plan No. 2 as outlined except for the following:

1. Article I, Section 3—Effective Date

The effective date of the Plumbers' Laborers' Plan shall mean January 1, 1958.

2. Article III, Section 1—Credited Service

Past Credited Service for the Plumbers' Laborers' Plan shall be limited to the calendar years from 1953 through 1957.

Current Credited Service shall consist of employment in the industry during each calendar year beginning January 1, 1958 as reported to the Plumbers' Laborers' Pension and Disability Trust Fund or such other Laborers' Trust Fund or Funds as may be specified and for which payments have been made into the Fund, in units of one-quarter (1/4) year and multiples thereof for the period between January 1, 1958 and December 31, 1969 and in units of one-eighth (1/8) year and multiples thereof for the period subsequent to January 1, 1970.

3. Article V—Amount of Benefits

The monthly retirement benefit shall be Five Dollars ($5.00) multiplied by the employee's years of Credited Service.

The Plumbers' Laborers' Plan started paying pensions on January 1, 1963.

Your Union obtained this Program for You.

Be a Good Union Member!

Office - Supreme Court, U.S.
FILED
JUN 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1891

In the Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether employer contributions to union trust funds for health and welfare, pension, and training are "wages" for purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 670 F. 2d 208. The opinions of the Benefits Review Board (Pet. App. 17a-22a, 28a-35a) are reported at 12 B.R.B.S. 87 and 6 B.R.B.S. 754. The opinions of the administrative law judges (Pet. App. 23a-26a, 36a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981. A petition for rehearing was denied on January 14, 1982. The petition for a writ of certiorari was filed on April 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From November 1973 until he was fatally injured while performing construction work in the District of Columbia in April 1974, James H. Hilyer was employed by petitioner Morrison-Knudsen Construction Company (Pet. App. 29a). Under the collective bargaining agreement in effect during that time, for each hour that each employee worked, Morrison-Knudsen was required to pay 28 cents into a health and welfare fund, 35 cents into a pension fund, and five cents into a training fund (*id.* at 6a). These funds provide employee benefits such as life insurance, health insurance, retirement benefits, and career training. The contributions were made directly to the trust funds, not the employees, and the individual employees had no role in the funds' management (*id.* at 9a).

Immediately upon Hilyer's death the company began paying death benefits to his widow, respondent Sonia Hilyer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("the LHWCA"), 33 U.S.C. 901 *et seq.*, which is made applicable to employment in the District of Columbia by D.C. Code Ann. § 36-501 (1973) (Pet. App. 5a-6a). Under 33 U.S.C. 909, the weekly death benefit due respondent Hilyer was 66-2/3% of her husband's average weekly wage as determined under 33 U.S.C. 910.

Respondent Hilyer disputed the amount of the benefits being paid her, contending, *inter alia*, that calculation of her husband's "average weekly wage" erroneously failed to include his employer's contributions to the three union trust funds. An administrative law judge rejected her contention (Pet. App. 7a), and the Benefits Review Board affirmed that portion of his order (*id.* at 33a).[1] The Board ruled that the

[1]The Board remanded for reconsideration of the attorney's fees award (Pet. App. 34a). On remand, an administrative law judge entered a new award (*id.* at 24a-26a), which subsequently was modified by the Board (*id.* at 17a-22a).

statutory definition of "wages" in 33 U.S.C. 902(13) made clear that only those "values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage" (Pet. App. 32a). It found the value of the trust fund contributions too "speculative" to be considered wages (*id.* at 33a). It also noted that inclusion of these forms of benefits would cause problems in computing an employee's average weekly wage by comparison to a similarly-situated employee under 33 U.S.C. 910(b) in cases, such as Hilyer's, where the injured employee did not work in the same employment for a full year (*ibid.*).

2. The court of appeals reversed (Pet. App. 4a-16a). It concluded that the employer's benefit fund contributions on Hilyer's behalf were identifiable, calculable values that must be included in the determination of Hilyer's average weekly wage (Pet. App. 8a-9a). Although the contributions were made, not to the employees, but to union funds over which individual workers had no control, the court found that the funds were a "channel" for the company to provide benefits to its employees (*id.* at 9a). The court also found that each of the benefits had "substantial economic value" to the employees because without the funds the employees would have had to spend their own money to obtain similar benefits (*ibid.*). Recognizing that the sums contributed by the employer to the funds probably would not purchase equivalent benefits on the open market, the court nonetheless concluded that "the most reasonable course is to measure the value of the fringe benefits by the amount of the employer's contributions to the benefit funds" (*id.* at 12a).

DISCUSSION

1. The decision of the court of appeals upsets a long-established administrative construction of the LHWCA. From the inception of the Act, the Department of Labor has taken the position that fringe benefit contributions are

not included within "wages" as defined in the LHWCA. See United States Department of Labor, Wage and Labor Standards Administration, Bureau of Employees' Compensation, *LS/WH Program Memorandum No. 32* (June 17, 1968) (reprinted at American Insurance Association Amicus Br. App. 1a-4a).[2] The Benefits Review Board, the administrative body that hears appeals from the administrative law judge in all LHWCA cases, also has consistently held that fringe benefits are not "wages" for the purposes of computing LHWCA benefits. See, *e.g., Collins* v. *Todd Shipyards Co.*, 5 B.R.B.S. 334 (1977). The change in benefit computation compelled by the decision below is of great importance. It will result in a substantial increase in LHWCA benefits in many cases, which will require considerable readjustment in the insurance process of anticipating the level of future benefits. Moreover, under the old interpretation, computation of compensation benefits was relatively simple and certain.[3] The new rule will likely result in

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[2]The Department of Labor briefly departed from this longstanding interpretation in the litigation of this case before the court of appeals. The Director of the Office of Workers' Compensation Programs petitioned for review of the Benefits Review Board's order and contended that the employer's fund contributions here should have been included in determining Hilyer's average weekly wage. Upon further consideration, the Department of Labor has concluded that the correct interpretation of the LHWCA is that fringe benefits are not wages within the meaning of the Act, thus reverting to its previous, longstanding interpretation. The Director has urged this view in a brief filed in two consolidated cases now pending in the Ninth Circuit, *Duncanson-Harrelson Co.* v. *Director, OWCP*, No. 79-7093, and *Freer* v. *Duncanson-Harrelson Co.*, No. 79-7094, and he has apprised the Fifth Circuit of his position in connection with its consideration of *Levis* v. *Farmers Export Co.*, No. 81-4258, and *Waters* v. *Farmers Export Co.*, No. 81-4273.

[3]With minor exceptions, only monetary compensation served as the base, and the vast majority of claims were not disputed. Of the contested claims, many were resolved by informal conferences conducted by Labor Department claims examiners without resort to formal hearings before administrative law judges and subsequent appeals, which introduce significant delays into the process.

a significant increase in litigation over LHWCA awards in order to resolve new questions raised by the inclusion of fringe benefits in the base for computing those awards.

The decision below is the first judicial decision to reject the view that LHWCA wages do not include fringe benefits, but its effect is far-reaching. Because of the decision of the court of appeals in this case, the Benefits Review Board has abandoned its earlier position and held that it will now include fringe benefits in the computation of LHWCA wages. *Minick* v. *Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), slip op. 6-7.[4] Thus, at least at the administrative level, all claims for benefits under the LHWCA will be governed by the decision below.

Although we would not normally urge the Court to review the first appellate decision on an issue, several practical considerations suggest that course here. Two cases raising the fringe benefits issue are currently pending in other courts of appeals (see note 2, *supra*); because of the importance of the issue presented and the fact that the decision below is erroneous, it is almost inevitable that a conflict requiring resolution by this Court will arise. In the meantime, the Board's stated intention to apply the court of appeals' decision on a nationwide basis will require substantial efforts by insurers to readjust the workers' insurance program to account for the higher benefit payments that will result. And the ruling will almost certainly increase the caseload of an already overburdened LHWCA administrative system[5] by requiring the determination of new, related

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[4]The Director has moved the Board to reconsider its decision in *Minick*. We are lodging a copy of the decision with the Clerk of this Court.

[5]A recent government study has found that the LHWCA administrative staff is not sufficient to handle its present workload. Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 30-32 (Apr. 1982). Excluding District of Columbia claims, 59,594 lost-time injuries were

questions such as which fringe benefits must be included in wages and how their value is to be determined—questions that will not arise if the court of appeals' decision is reversed. In the interest of judicial and administrative economy, it is appropriate for the Court to minimize these consequences by acting now to resolve the uncertainty created by the decision below, which threatens both the employees' interest in ~~reaching~~ receiving a prompt and certain recovery and the employers' interest in precise identification of their contingent liabilities. See *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 282 (1980).

2. In addition to the importance of resolving the uncertainty created by the court of appeals' decision, further review is necessary here because the decision below misinterprets the LHWCA. "Wages" are expressly defined in the LHWCA, 33 U.S.C. 902(13), as "the money rate at which the service rendered is recompensed * * *, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities * * *." The plain meaning of this definition does not encompass employer contributions to benefit funds; it appears restricted to actual payments made to the employee or traditional wage substitutes provided directly to him, such as room and board. In the absence of any contrary indication in the legislative history, this plain meaning should control. Moreover, recourse to other evidence strongly confirms the apparent meaning of the statutory language. See, *e.g.*, *United States* v. *Clark*, No. 80-1121 (Jan. 12, 1982), slip op. 6.

Congress' treatment of the concept of wages in the analogous context of the Davis-Bacon Act, 40 U.S.C. 276a,

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reported in fiscal year 1980. *Id.* at 31. The Office of Workers' Compensation Programs estimates that approximately 75% of these injuries resulted in compensation payments.

indicates the error of the decision below. The Davis-Bacon Act provides that wages paid on federally funded construction projects should accord with prevailing local wages. In 1964, the Davis-Bacon Act was amended by inserting a definition of "wages," 40 U.S.C. 276a(b), to establish that benefit fund contributions would be considered wages for the purposes of the Act. In making this change, Congress explained that such fringe benefits were rare when the Davis-Bacon Act was enacted in 1931 (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)); hence, the existing statute did not include those fringe benefits and congressional action was necessary to cover trust fund contributions. By the same token, Congress could not have contemplated when it passed the LHWCA in 1927 that trust fund contributions would be included in the wage base for benefits, and Congress' failure to amend the LHWCA as it did the Davis-Bacon Act suggests that these contributions are not LHWCA "wages." See *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 31-32 (1959). This conclusion is buttressed by the longstanding administrative interpretation excluding fringe benefits and the fact that employers and insurers have long ordered their affairs on this basis. See *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978).

Decisions of this court in other contexts also suggest that fringe benefits such as those involved here should not generally be encompassed within the definition of "wages." In *United States* v. *Embassy Restaurant, Inc., supra*, the Court held that employer contributions to trust funds for the benefit of employees were not entitled to the priority given by the old Bankruptcy Act, 11 U.S.C. 104(a)(2), to "wages * * * due to workmen." The Court explained that "not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to

employment" (359 U.S. at 32); accordingly, congressional action was necessary for such trust fund contributions to be treated as wages (*id.* at 35).[6] See also *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977) (pension benefits are not like wages for the purposes of veterans' seniority rights); *Joint Industry Board* v. *United States*, 391 U.S. 224 (1968) (unpaid contributions to annuity plan are not "wages" under 11 U.S.C. 104(a)(2)). *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957), on which the court of appeals relied (Pet. App. 11a-12a), also lends support to this view. While the Court there did find that a federal contractor's surety was liable under the Miller Act, 40 U.S.C. 270a *et seq.*, for employer trust fund contributions, the Court later explained in *Embassy Restaurant* (359 U.S. at 34-35) that *Carter* turned on the fact that the language of the Miller Act covered, not wages, but all "sums justly due" to employees. Indeed, the *Carter* Court specifically noted that the contributions there, by the explicit terms of the trust agreement, were not to be deemed wages. 353 U.S. at 214, 217.

In addition, including these fringe benefits within the wage base for LHWCA compensation leads to results that Congress could not have intended. First, because of the varied nature of fringe benefits, calculation of LHWCA compensation may become substantially more complicated and contentious, which would disrupt the Act's goal of prompt and certain disposition of benefits. See, *e.g.*, *Norton* v. *Warner Co.*, 321 U.S. 565, 568 (1944). Second, increasing LHWCA benefits to reflect employer trust contributions not paid to employees substantially increases the possibility that a disabled employee will receive disability benefits that

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[6] In the new Bankruptcy Code, Congress has directly addressed this question and has drawn an explicit distinction for priority purposes between wages and fringe benefits like the trust fund contributions involved in this case. See 11 U.S.C. (Supp. IV) 507(a)(3), (4).

exceed the take-home pay he was earning when employed, thus giving him a disincentive to return to work. See *Potomac Electric Power Co.* v. *Director, OWCP, supra*, 449 U.S. at 290 n.9 (Blackmun, J., dissenting); cf. *MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 110-111 (1944) (practical considerations must be taken into account in evaluating congressional intent under the LHWCA).[7] Moreover, at least in the case of some employer trust contributions, it makes no sense to include them in the base for computing post-injury benefits. For example, some of the contributions involved here went to a fund that provided an insurance policy on James Hilyer's life. Respondent Sonia Hilyer has received the full benefit of those contributions as the beneficiary of the life insurance policy; there is no need to carry those trust contributions over into her LHWCA death benefit because she does not have to bear the expense of paying premiums on an insurance policy on James Hilyer's life.

In sum, it is appropriate for the Court to grant review here in order to resolve the uncertainty and minimize the adverse consequences created by the court of appeals' erroneous departure from the longstanding administrative interpretation of the LHWCA.

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[7]Because of the tax-free nature of LHWCA benefits and the availability of payments from other sources, this disincentive already exists in some cases (see *Longshoremen's and Harbor Workers' Compensation Act Needs Amending, supra*, at 13-17, 26), but the problem will be exacerbated by the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1982

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In the Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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In the Supreme Court of the United States

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v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

In our brief in this case filed on June 16, 1982, we noted that the Director had moved the Benefits Review Board to reconsider its decision in *Minick* v. *Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), which announced that the Board would now include fringe benefits in the computation of LHWCA wages. This memorandum is filed to inform the Court that on July 29, 1982, the Board granted the motion for reconsideration and stated that the *Minick* case would be held in abeyance pending the Ninth Circuit's decision in the consolidated cases of *Duncanson-Harrelson Co.* v. *Director, OWCP*, No. 79-7093, and *Freer* v. *Duncanson-Harrelson Co.*, No. 79-7094.[1] We do not believe that this development, which does not indicate that

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[1] A copy of the Board's order is appended hereto.

the Board will return to its old position that fringe benefits are not to be included in the computation of LHWCA wages, in any way alleviates the uncertainty that warrants granting certiorari in this case.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1982

APPENDIX

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

No. 80-835

LOYD E. MINICK Claimant-Respondent	)	
v.	)	
LEVIN METALS CORPORATION	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Employer/Carrier-Petitioners Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent Cross-Petitioner	)	ORDER

In a motion dated May 4, 1982, the Director requested that the Board reconsider its Decision and Order of April 28, 1982, holding that employer contributions to fringe benefit funds must be included in a determination of an

injured employee's average weekly wage. Moreover, assuming that the Board grants this motion, the Director has requested that the Board defer its reconsideration until the United States Court of Appeals for the Ninth Circuit issues its decision in *Duncanson-Harrelson Company* v. *Director, OWCP,* Nos. 79-7093 and 79-7094 (9th Cir., filed March 8, 1979), *appealing Freer* v. *Duncanson-Harrelson Co.,* 9 BRBS 888 (1979), a case which raises the same issue.

After careful consideration of the issue raised, we have decided to grant the Director's motion. Accordingly, we grant the Motion for Reconsideration and will hold the instant case in abeyance pending the decision of the Ninth Circuit in *Freer.* At that time, we will reconsider our decision of April 28, 1982.

In a subsequent motion dated June 15, 1982, employer moved that the remand ordered in our decision of April 28, 1982, be stayed pending the disposition of *Hilyer* v. *Morrison-Knudsen Construction Co.,* 670 F. 2d 208, 14 BRBS 671 (D.C. Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3840 (U.S. April 13, 1982) (No. 81-1891), which is currently before the United States Supreme Court. Claimant has filed a response opposing this motion. Having decided to reconsider our decision of April 28, 1982, when the Ninth Circuit renders its decision in *Freer,* we deny employer's motion to stay the remand of our earlier decision pending the Supreme Court's disposition in *Hilyer.* Our denial of employer's motion is without prejudice; accordingly, if necessary, employer can renew its motion after the Ninth Circuit renders its decision in *Freer.*

Lastly, claimant's attorney has filed an application for attorney's fee for work performed before the Board. An award of an attorney's fee is not payable until a final decision is issued. *See generally, Wells* v. *International Great Lakes Shipping Co.,* 14 BRBS 868 (1982). Since we have

granted reconsideration in the instant case, the application for an attorney's fee is premature. We will hold this application in abeyance until such time as a final order is issued in this case.

SO ORDERED.

Robert L. Ramsey, Chief
Administrative Appeals Judge

Julius Miller
Administrative Appeals Judge

Ismene M. Kalaris
Administrative Appeals Judge

Dated this 29th
day of July 1982

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and

ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT HILYER

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QUESTION PRESENTED

Whether employer payments to three union trust funds for health and welfare, pension, and training purposes, the amount of which is measured by the employee's working time, and which are reserved for his ultimate benefit, are to be computed as being a part of his "wages" under the Longshoremen's and Harbor Workers' Compensation Act.

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and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT HILYER

STATEMENT

The carrier/employer petitioners, joined at this point by the Director of the Office of Workers' Compensation Programs of the United States Department of Labor, argue that the challenged decision conflicts with the statutory definition, the intent of Congress, and prior decisions. Collectively they predict virtual chaos resulting to both private and public administration if the rule is permitted to remain.

In no sense are these points valid or even controversial. The contrary appears to be so obvious that it is only by discussing undecided matters that petitioners have any arguments for this writ. Additionally their projection of future administrative confusion appears to have been vastly exaggerated to further serve this purpose.

In this response we seek to show that the actual decision of the Court of Appeals was properly restricted to adjudging the three *negotiated* benefits in question. With that limitation the arguments of petitioners are seen to be based on their expansion of the term "fringe benefits" beyond the matters decided and, as such, lack any basis for review by this Court.

REVIEW OF THE ISSUE

Although the disputed decision has been printed in its entirety (Pet. App. 5a-16a), the only question at issue is to be found in the lower court's ruling in Part I. That holding is based on a precise statement of the facts at issue (pp. 5a-7a), essentially that at the time Hilyer was killed in April 1974, he was shown to have been a dues-paying member of the Laborers' District Council of Washington, D.C. and Vicinity (the "Union"), and that the Union had negotiated an employment contract with Morrison-Knudsen and other employers which included a requirement that the three described employer payments should be made directly into the Union's Taft-Hartley trust funds for medical, pension, and training use. Each such payment was to be measured by one hour of Hilyer's working time. Had he lived, his equity in these three Taft-Hartley funds would have been repaid with medical insurance, pension installments, and training rights, both for himself and his family — the first two of which his widow must now purchase privately, and the third is a necessary item to renew her skills for her own reentry into the job market.

Were these three items a part of Hilyer's compensation "wages"? That was the single issue before the Court of Appeals. Three *negotiated* payments by the employer were made under the force of statute, a total of 68¢ for each hour of Hilyer's working time. Petitioners' argument that "fringe benefits extend into the area of petty privilege is to argue a case which the Court of Appeals never decided.

Neither the original petitioners or the formerly respondent Director describe the issue properly. Both avoid making any reference to the two most critical elements, first, that the payments were made to conform to a negotiated contract and, second, they were paid by the hour for Hilyer's services. The true issue on this petition therefore is quite different from that urged by petitioners. In the phrasing of this respondent it has been set out on the first page of this brief. It is that question to which the answer is clearly "yes" as the Court of Appeals held. To show the correctness of that decision we look first at the statute itself,* second to the intent of Congress, and third we review the prior judicial determinations bearing on this subject.

I.

THE ACT DEFINES NEGOTIATED BENEFITS TO BE A PART OF "WAGES"

As of the date of Hilyer's death, the District of Columbia had adopted the Act by reference (36 D.C. Code §§ 501, 502 (1973)), including its definition of "wages" (33 U.S.C. § 902(13), hereinafter § 2(13)):

> "'Wages' means the money rate at which the service rendered is recompensed under the con-

*Longshoremen's and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. § 901 *et seq.*

> tract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer."

This definition is in two distinct parts. The first portion is based on the necessary existence of a *contract* of hiring under which the employer has used a "money rate" to pay for the services rendered by the compensation claimant. As to the second portion, petitioners argue that the phrase "similar advantage" is ambiguous. Mrs. Hilyer's claim is compensable under either portion of the statutory definition.

The brief of the original petitioners and of the respondent/petitioner, the Director of the Office of Workers' Compensation Programs (the "Director"), have both avoided the first portion of this definition:

> "... the *money rate* at which the service rendered is recompensed *under the contract of hiring in force at the time of the injury* ... (*supra,* emphasis added),

which precisely describes the contract conditions under which Morrison-Knudsen paid 28¢/hr. for each laborer's health and welfare, 35¢/hr. for his pension, and 5¢/hr. for his training — each according to a "money rate" specified in the agreement. Moreover, the definition states that "wages" as defined constitute the amounts the employer is obligated to pay for the "services rendered", not what the employee receives. This definition thereby avoids any difficulties of fixing a value for non-bargaining privileges.

On the facts of this case the Court of Appeals ruled that these payments into three Union trust funds were in legal effect the same as the take-home pay which Hilyer

received weekly, *Arroyo v. United States*, 359 U.S. 419, 425-6 (1959); *United Mine Workers Health and Retirement Funds v. Gracie Robinson, et al.*, ____ U.S. ____, 50 LW 4288 (No. 81-61), Mar. 8, 1982.

Each payment by Morrison-Knudsen increased Hilyer's equity in these funds. For that reason the payments were a negotiated part of the "recompense" which that petitioner paid him for his services, direct pay plus an equity in each of the three funds. Accordingly, the payments were directly within the first portion of the statutory definition.

Turning to the second portion of the definition and assuming *arguendo* that the point made above is inadequate, an inquiry as to the phrase "similar advantage" becomes necessary.

As the Benefits Review Board (the "Board") and the Court of Appeals saw the meaning of this portion of the definition, both were agreed that it meant that non-pay benefits which could be reasonably evaluated in money terms must be included in the"wage" base,

> "We agree with the Board that this definition 'clearly implies that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage.' " (C.A.Op., Pet. App. p. 8a)

Are these three benefits "calculable"? The Board said "no", all three were "speculative". The Court of Appeals disagreed with that conclusion and held that they were not only identifiable but, using everyday insurance formulae, were calculable as well, adding that such an effort was not essential to any valuation under the Act since the employer payments were themselves a measure of Hilyer's equities at the time of his death (Pet. App. p. 12a).

In support of this conclusion, the fact that a death claim under Section 10 of the Act is here involved is not without significance. It is clear that Hilyer as an individual had lost any further possibility of participating in the ultimate distribution of these moneys and his rights had become fixed. If they could not be calculated under those circumstances, what possible equity measurement could have been made for an employee who was merely injured and intended to return to work? It stands to reason that the Act cannot be wholly frustrated by rejecting all such claims as "speculative".

In summation, the Court below was plainly correct under the definition in the Act, whether the first or second portion were to be used. The "values" in question were not only spelled out in the agreement between the employer and the Union, but the payments made by Morrison-Knudsen to the trust funds were a substantial part of Hilyer's "recompense", were fixed in precise money terms, and the 68¢/hr. total should have been included in his widow's compensation base.

II.

THE DECISION BELOW CONFORMS TO THE INTENT OF CONGRESS

Where the terms of a constitutional statute are plain, it is not the responsibility of the courts to further consider the reason for its enactment, *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Ex parte Collett*, 337 U.S. 55 (1949); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980). It is not a judicial function to question the wisdom of Congress, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). Where the words are ambiguous, the search for the Congressional purpose must avoid reaching a conclusion which would lead to "incongruous results", *Voris v. Eikel*, 346 U.S. 328 (1953); *Baltimore &*

Phila. Steamboat Co. v. Norton, 284 U.S. 408, 412-413 (1932).

As indicated above, the words of Section 2(13) of the Act appear to be plain and the challenged decision properly carries out the purpose of the legislation. Any other holding would have brought the Act into conflict with each of the other related enactments made by the Congress and would thereby break the legislative pattern and create the very incongruity rejected in *Voris.*

We look to the 1972 revision of the Act and the absence of any change to the "wages" definition. As pointed out in *N.E. Marine Terminal Co. v. Caputo,* 432 U.S. 249, 261 (1977), an increase in the level of benefits was one of the three principal reasons given for the revision. See also *P.C. Pfeiffer v. Ford,* 444 U.S. 69 (1979). There was no reason why Section 2(13) should have been revised for this purpose. As it read, it covered the changes in labor practice which all parties note, the gradual but now widespread resort in labor negotiations to the provisions for specified payments into union trust funds in lieu of further advances in individual pay. In fact, it was the Congressional action in not revising Section 2(13) which is the strongest evidence that such payments by the employer were already considered to be included in the existing definition of wages. Had the Congress wished to narrow this, it would have said so.

To the same effect although of minor judicial import, we quote the opinion of an expert in this field, the language of Judge Miller dissenting in *Freer v. Duncanson-Harrelson Co.,* 9 BRBS 888 (1979):

> "It is my opinion that Congress intended the definition of wages to be flexible by including in that definition the term 'similar advantage received from the employer.'"

This was the view taken by the Court of Appeals (Pet. App. p. 8a) and fully justifies the non-revision of Section 2(13) at a time when Congress had become fully aware of the more modern labor practice of providing for these benefit funds. They relieved the employer of pension and off-premises medical costs.

The Congressional pattern may be found by considering parallel statutes, *Andrus v. Allard*, 444 U.S. 51 (1979). In effect, petitioners agree:

> "Moreover, one could argue — as unions and claimants undoubtedly will — that if the decision below makes sense as to the LHWCA, it makes equally good sense as to other statutes such as the Federal Employees Compensation Act, and those acts governing temporary disability insurance, unemployment compensation, Social Security, and state workers' compensation programs, which include language essentially the same as LHWCA." (Pet. Bf. p. 8)

The Court below took note of the fact that inclusion of trust fund payments had eight years earlier been written into the Davis-Bacon Act (40 U.S.C. 276(b); S. 963, 88th Cong. 2d Sess. (1964)) and that the same legislative purpose underlaid the adoption of the Labor Management Relations Act (29 U.S.C. 141 *et seq.;* 61 Stat. 136). Why then would the Congress have made these funds in the hands of the unions a trust for the members, *United Mine Workers Health and Retirement Funds v. Gracie Robinson, et al., supra; Inland Steel Co., et al. v. N.L.R.B.*, 170 F.2d 247, 251 (7 Cir. 1949); *N.L.R.B. v. Niles-Bement Pond Co.*, 199 F.2d 713 (2 Cir. 1952); *Arroyo v. United States, supra,* if they had not visualized such employer payments as being a form of compensation for the services rendered by those members? Had the funds been intended for the ultimate benefit of the union officials, no such provision would have been enacted.

The language of *Inland Steel* is very much in point:

> "Assume, however, that such supposed payments were made to employees as a result of a company obligation contained in a plan or program. Such an obligation would represent a part of the consideration for services performed, and payments made in discharge of such obligation would, in our view, be 'wages' or included in 'conditions of employment'." (At p. 253).

In the *Niles-Bement Pond* case it was held that the National Labor Relations Board is to decide which benefits are to be negotiated. True, that case involved a bonus payment. But the regularity of its payment made it a bargainable item. This distinction between the includability of happenstance benefits as against those of an entitlement character is shown by two decisions under the Selective Service and Training Act of 1940 (50 U.S.C. Appx. § 459(c)(1)). In *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966), severance pay by the employer was so fixed a right of the employees that it had to be included in a veteran's claim. On the other hand, in *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977), it was ruled that pension payments by the employer were not like wages for purposes of fixing veterans' seniority rights, but were rewards for actual continuous employment which was not the case of a returning veteran. Had they been due with "reasonable certainty" they would have been included.

The inclusion of such benefits in wages has also been the rule under the parallel Federal Employment Compensation Act ("any other benefit paid for out of the compensation fund"; 5 U.S.C. 790). This principle was adopted forty years ago in *United States v. Crystal,* 39 F.Supp. 220, 221 (N.D. Ohio, 1941):

> "There is no doubt that compensation, as defined in the Act, was intended to cover everything that the government had paid out, not only what the employee had received."

The Court below noted (Pet. App. p. 11a) your decision in *United States ex rel Sherman v. Carter*, 353 U.S. 210 (1957), holding such fund payments to be an integral part of the sums "justly due" to the union for its members under the Miller Act (40 U.S.C. § 270(2a)):

> "The parties have stipulated that contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. The unpaid contributions were a part of the compensation for the work to be done by Carter's employees."

Employer payments into union trust funds must be accounted for by a claimant under the Social Security Act (42 U.S.C. § 1107; 49 Stat. 642). The Seventh Circuit in the *Inland Steel* decision referred to § 907 of that Act (p. 254) as showing the intent of Congress to include in the employee's total compensation "all remuneration . . . including the cash value . . . paid in any other medium than cash."

Lastly, a direct entry into the thinking of our Congress is to be found in the requirement that fund pension payments be calculated as part of the income of the employee under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.; Alessi v. Raybestos Manhattan, Inc.*, ____U.S.____, 101 S.C. 1895 (1982). In short, every statutory provision dealing with the rights of *labor* reinforces the reading of Congress' intent to include employer trust fund payments in the earnings of the individual laborer.

United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959) and *Potomac Electric Power Co. v. Director,*

OWCP, supra, are not to the contrary. The first was concerned with specified priorities under the bankruptcy laws for benefits *not* measured by hours, and the latter followed the plain language of the Act itself, applying the outdated compensation schedules provided by Congress, refusing to vary the legislative command regardless of the hardship involved.

Neither case therefore derogates from the stated conclusion above. The Court of Appeals found the legislative intent to be to include the challenged payments in an individual's wages and was fully justified by the comparisons it made.

III.

THERE ARE NO FEDERAL CASES WHICH DISAGREE WITH THE RULING BELOW

The Court of Appeals called this the first case to raise the question of the inclusion of Taft-Hartley fund payments in compensation "wages". Since such funds have been in increasing existence for at least some time before the passage of the Davis-Bacon Act in 1964 or the Labor Management Relations Act in 1974, petitioners' claim that compensation for them has never been paid before may not be wholly true. For example, in *Petition of U.S. Steel Corp.*, 436 F.2d 1256, 1274 (6 Cir. 1970), involving the death of a seaman, the Court of Appeals said:

> "Shipowners do not dispute the propriety of an award for fringe benefits."

The case held that future fringe benefits — similar in many respects to the present situation — constituted an essential part of the employee's "earning capacity", and this was the measure of compensation "wages". Whether others were so paid without making an issue of it, we do not know. But it does seem reasonable to con-

clude that *Hilyer* is the first case in which the question had been taken to issue in the federal courts.

To revert for a moment to the Seventh Circuit speaking in *Inland Steel*, the Court there noted the implication in the broad Congressional use of the word "wages":

> "Certainly the term 'wages' was intended to include something more than rates of pay."
>
> (p. 255)

In the statute there under consideration, "wages" had been defined as "all remuneration" (Social Security Act, *supra*), and the fund payments were regarded as coming within this definition.

Again, in *Curry v. United States* 338 F.Supp. 1219, 1223 (N.D.Cal. 1977), a District Court, in analysing the Public Vessels Act (46 U.S.C. § 781 *et seq.*), said,

> "Earning capacity includes the probability of fringe benefits."

Two cases discussed by the Court of Appeals (Pet. App. pp. 11a-13a) and now by the Director (Dir. Bf. pp. 7-8) are *Carter* and *Embassy*. In *Carter* it is held that an employer's payments into Union trust funds on the basis of hours worked were sums justly due to the employees and had to be paid by a federal contractor's surety. The ruling below so read *Carter*, and as showing, first, that the hourly measurement of such payments made them a part of the employee's "wages" (Pet. App. p. 12a) and, second, that in lieu of any complex actuarial computation, a simpler method was to value the employee's equity in the funds at the same amount as his employer had paid in for him (Pet. App. p. 12a).

Embassy, two years later, did not diminish this holding for the reasons given in the Circuit ruling (Pet. App. p. 13a). In *Embassy* you had before you the Bankruptcy Act with its own special plan for the distribution of assets to

creditors. That statute was enacted for a purpose almost diametrically opposed to the purpose shown by the Congress in revising the Compensation Act in 1972. The language of the Bankruptcy Act was clear and the priorities set were specific. Only the actual pay scale of the worker was to be included in the first category. That did not change the fact that the trust fund payments were also the *earnings* of the worker collectible as debts. No withdrawal was made from the broad reading of *Carter.*

Much has been said also about *Potomac Electric Power Co. v. Director, OWCP, supra,* where the claimant unsuccessfully attempted to avoid the schedules of compensation laid down by the Act (Pet. Bf. pp. 10a-11a). The case again demonstrates, as in *Embassy,* that this Court will apply specific terms set out in a statute. If Congress enacted the schedules in plain words, they were to be followed regardless of any hardship caused by subsequent inflation. The considerate change by the D.C. Circuit was reversed.

Since we argue here for the correctness of the ruling below and the comprehensiveness of the statutory definition of "wages" in the Act, *PEPCO* is a decision which directly supports the position taken by the Court of Appeals and completes our conclusion that all federal court decisions agree with the ruling below.

IV.

THE REVERSAL OF POSITION BY THE DEPARTMENT OF LABOR IS NOT A SUFFICIENT GROUND FOR CERTIORARI

As of this point it seems reasonably clear that the decision below was fully in accord with all traditional measures of correctness. The arguments of petitioners show no validity in the light of the facts of the case. Sum-

mary affirmance would appear to be called for. There is, however, one serious obstacle to the further enforcement of the Court of Appeals holding. This is the reversal of agency position on this issue.

Before the Benefits Review Board and the Court of Appeals in this case the respondent Director of the Office of Workers' Compensation Programs argued for the inclusion of Morrison-Knudsen's three Taft-Hartley trust fund payments in the compensation base of Hilyer on the ground that these were a part of his "wages" as defined by the Act, and the same stance has been taken before the Ninth Circuit where the Director said,

> "Apparently, counsel for the Director who presented oral argument did state, without elaboration, that the pension plan payments should be included when computing decedent's average wage."
>
> *Duncanson-Harrelson Co. v. Director, O.W.C.P.* No. 79-7093, Supp. Bf. for the Director, p.2

However, on this application the Director has not merely reversed his position — as he did in the cited memorandum in the Ninth Circuit — but has additionally joined with the other petitioners in the prayer for review by certiorari, saying now that these "fringe benefits" should *not* be included in Hilyer's compensation base.

It has to be conceded as a hornbook proposition that the general rule is that a regulatory interpretation of a statute by the responsible agency has judicial significance in a case of true ambiguity of statutory phrase and may be binding where an omission occurs, *Ford Motor Co. v. Milhollin,* 444 U.S. 555 (1980). While reversal of position by an agency is not an unknown occurrence, the statute remains as the governing factor, and an agency reading by practice or regulation will be followed only when it reasonably accords with the Con-

gressional purpose. Although this respondent considers the language of the statute and the legislative intent to be sufficiently clear to make the Director's present stand unreasonable, it cannot be denied that the views of the Department of Labor carry great weight.

Nevertheless, this respondent argues that the policy reversal involved is not an adequate basis for granting certiorari. We have found no prior instance in which any federal agency reversed itself following a Court of Appeals decision which it had sponsored, in order to join in a contrary application for certiorari. There have of course been confessions of error by the Solicitor General, but those have been for the avowed purpose of avoiding certiorari, not in order to apply for its granting. Here the Director, who as a judge on the Board had earlier written the adverse decision in *Hilyer,* has now joined with the original petitioners in order to request the granting of the writ to reverse the decision favorable to Mrs. Hilyer.

Nor, in this respondent's opinion, is the change one resulting from Labor Department concerns about the administrative difficulties which might arise in evaluating "fringe" benefits.

The Solicitor General's brief concedes that such benefits as these three were not merely the outcome of a statutory negotiation leading to the collective bargaining agreement (Dir. Bf. p. 2) under which Hilyer was paid, but are given in "money terms". If we are correct in our showing that the challenged decision was in accord with the statutory definition of "wages", agreed with the observable intent of Congress, and followed all prior federal cases, is it now to be changed to adopt the current reading of the statute by the Department of Labor?

It is said that this is merely a return to a long established point of view. Yet a reading of the full 1968 Labor Department memorandum referred to by the Solicitor

General (Bf. p. 4, complete text in *Amicus* Bf. of A.I.A., pp. 1a-4a) does not seem to describe any firm commitment to exclude negotiated benefits from compensation wages; it merely seems to say that an insufficient basis existed for change. The memorandum takes note of *Carter* as being somewhat to the contrary, adds that this position was not changed by the *Embassy* decision, and concludes that for the lack of more specific judicial authority, the existing exclusion practice should be allowed to continue.

On this point the question of dating is important. Many arguments are made by the three petitioners on unassailable personal assertions that the decision below upsets a long tradition of the insurers, employers, Board and courts. Yet neither *Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977), nor *Hilyer* was decided by the Board *until 1977*, long after Congress had acted in the statutes referred to above. As the Director puts it, the ruling below is "the first judicial decision to *reject* the view that LHWCA wages do not include fringe benefits. . ." (Dir. Bf. p. 5; Emphasis added). To read that phraseology, one is left with the implication that numerous prior decisions had been handed down which excluded such benefits as these from the compensation wage base. Yet as we have indicated in Part III above, there are no such cases, all court decisions being supportive of the Court of Appeals ruling in this case —perhaps with the one exception of the Arizona state decision referred to by the Court of Appeals (Pet. App. p. 10a, ftn. 7) — and the first judicial analysis was in 1981! What then becomes of these multiple arguments that a rejection of benefit inclusion in the compensation basis has been such a long-standing position by practically everyone?

Finally, the Director argues that administrative chaos and confusion in evaluation of these programs by an inadequacy of personnel will be the inevitable result of the challenged ruling. The argument seems wrong. Evalua-

tion is not that difficult. First, this is a *death* claim under § 910 of the Act, which eliminates any life table or vesting calculations since Hilyer could have no further call on these funds and is deemed to continue in the same position indefinitely. Second, the only benefits involved under these facts are the outcome of statutory bargaining between this employer and his employees' union and are tax-deductible as part of his payroll. Nor is there any great need here for complex actuarial calculations. The payments to the funds were each in a stated dollar amount, as the Court of Appeals noted in holding that *Carter* suggested adopting that sum to measure Hilyer's equity and earnings.

In toto, the change of position by the agency does not appear to be based on any exercise of a reasonable effort to interpret an ambiguous statute. The position taken does not accord with other existing statutes or past cases. It fails to distinguish between items of minor advantage, including all the various forms of petty privilege, and the three negotiated payments which were made by this employer in order to secure Hilyer's services. Finally, it does not represent a return to any firm agency position previously taken by the Board and contradicts the liberal construction rule of the statute, *Friend v. Britton,* 220 F.2d 820 (D.C. Cir. 1955) (Pet. App. p. 13a). The petition of the Director should be ignored.

CONCLUSION

The writ should be denied. The insurer/employer petitioners and *amici* seek to return to 1927 labor practices. In doing so they have delayed proper payment interminably. Eight years of constant litigation have gone by since Hilyer died. On that basis, complete compensation is hardly the "expeditious" remedy which was said to be a prime purpose of the statute in *Cardillo v. Liberty Mutual Co.,* 330 U.S. 469 (1947).

The manner of wage determination has long since changed. The National Labor Relations Board has been charged with determining which benefits will be subject to labor bargaining (29 U.S.C. § 151 *et seq.*), and have selected several — including these three — which require employer payments to be made into union-held Taft-Hartley trust funds. Such employee benefits are today among the usual "conditions of employment" clause of the LMRA. When such sums are paid by an employer on the measured basis of each employee's working hours, they create an equity base in the funds, and are as necessarily a part of his wages as if they had been paid to him in hand to be turned over to the union. Moreover, the ultimate payments from the fund to the employee are fully taxable in his hands as deferred compensation.

The change in the Labor Department's position does not give such credibility to petitioners' argument as to mandate a review by this Court.

Respectfully submitted,

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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

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Respondents.

REPLY BRIEF

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1. Respondent Hilyer does not appear to argue that the contingent interests at issue in this case were included in the definition of "wages" when the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") was originally passed in 1927. Instead, respondent argues that as changes in labor practices slowly evolved over the years, the definition of "wages" changed so as to include these contingent interests as either a money rate or other advantage within the meaning of the statute (Resp's Brief at pp. 7, 17). Although it is not entirely clear, respondent seems to be arguing that this evolving change had been accomplished by 1972, because Congress' *failure*

to change the definition when it revised the statute in 1972 is pointed to as proof that Congress *adopted* the new definition in that year.

This is a strange argument indeed. No court had held prior to 1972 that these contingent interests were part of "wages", and during the extensive hearings on the 1972 statutory revisions, no mention was ever made of any alleged change in definition. Yet Congress' failure to act in 1972 is taken as acquiescence in a new definition that was never brought to its attention. Surely if a change with such broad implications is to be read into a statute, it is up to the legislative branch to make the change. Since Congress made no changes in the definition of "wages" when it carefully considered all aspects of the Act and made substantial revisions in other sections in 1972, the courts must conclude that the original definition still prevails.

In this regard, one must ask whether Congress would have legislated the largest benefit increase in the history of compensation in 1972, so that benefits now run seven times what they were in prior years, if Congress had known that union fund payments were to be added to the benefits actually legislated. When one considers that these union fund payments would amount to a 30-60% increase in average weekly wages, the answer is clear.

2. Respondent Hilyer makes the extraordinary contention that because there are no federal cases which *disagree* with the opinion below, the opinion must be right. The fact is that there are no federal cases which *agree* with the opinion below. This is because no one ever contended in a federal court, until this case, that the types of contingent interests involved here were part of "wages." Even the Department of Labor, which argued at one stage below that certain payments into union trust funds should be considered "wages", has now completely reversed itself and admitted that its position below was wrong (Brief

for the Federal Respondent at p. 4 n.2). This return to the Department's longstanding interpretation of the Act shows why the instant case is the first one in the federal courts in which this novel theory has been put forth. If in fact the meaning attributed to the Act by respondent is "plain" (p. 7), and the issue is not novel (p. 3), one wonders why no one thought of respondent's interpretation for 70 years.

3. Respondent and amicus AFL-CIO [1] portray this case as insignificant. All of the known facts show otherwise.

Litigation concerning the central issue, for example, has virtually come to a halt awaiting action by this Court. Thus, as reflected in the Solicitor General's Supplemental Memorandum for the Federal Respondent, the Labor Department's Benefit Review Board has granted reconsideration of *Minick* v. *Levin Metals Corp.*, No. 80-835 (B.R.B. Apr. 28, 1982), a decision which followed the ruling below. But the Board has also deferred its reconsideration of *Minick* until the Ninth Circuit acts in *Duncanson-Harrelson Co.* v. *Director*, Nos. 79-7093 and 79-7094. The Ninth Circuit, in turn, has not even calendared *Duncan-Harrelson*, and apparently will not do so until after this

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[1] While the AFL-CIO takes a position before this Court contrary to that of petitioner and the Solicitor General, it is noteworthy that neither this union nor any other labor representative has opposed a section of a bill that has passed the Senate which would effectively reverse the decision below. See, *e.g.*, the testimony of Mr. Jay Power, Legislative Representative of the AFL-CIO, on S. 1182 and H.R. 25 before the Subcommittee on Labor Standards of the House Committee on Education and Labor, August 17, 1982, and the statement of the International Longshoremen's and Warehousemen's Union on the same bills before the same Subcommittee on the same date. There is no indication, of course, that a similar provision will ever pass the House, survive joint House and Senate approval, and be signed by the President.

The controlling D.C. Code provision was reenacted prior to the decision below and became effective July 26, 1982. The new Code provision, however, includes the same wage definition as before. 36 D.C. Code § 301(19).

Court rules on the instant case. In the only other case at the applleate level which raises the same issue, the Fifth Circuit has withheld its decision "pending action by the Supreme Court" in the instant case. *Levis* v. *Farmers Export Co.*, Nos. 81-4258 and 81-4273 (see Appendix A hereto). In the meantime, claims for union trust fund payments as part of "average weekly wage[s]" which were beginning to be made before Deputy Commissioners throughout the country are now being held in abeyance until the issue is resolved by this Court. Such claims relate not only to the three types of funds at issue in this case but to various other types of funds as well. If this Court failed to act, it is clear that Deputy Commissioners and then the federal courts would be inundated with a wide variety of claims. Thus, the argument of respondent and the AFL-CIO that the opinion below was a very narrow one, unlikely to have nationwide impact, is wholly refuted by what is actually occurring across the country.

4. The limited impact argument is also rebutted by the Solicitor General's brief and by the amicus briefs of the Alliance of American Insurers (150 insurers), the National Association of Independent Insurers (500 insurers), the American Insurance Association (150 insurers), and the National Association of Stevedores (68 companies). These briefs show without question that the Labor Department, insurers and private industry would be at a complete loss as to how to proceed if the decision below were to stand, and particularly if its ruling were to become applicable in other Circuits. Premiums and insurance coverage simply cannot be calculated for hundreds of thousands of workers on the basis of myriad union funds. In San Francisco alone, for example, as a result of collective bargaining between employee unions and the Pacific Maritime Association, there are eight different union funds, and each would have to be calculated for each worker, both for the future and, perhaps, retro-

actively. The situation is further complicated by the fact that while some union funds are maintained on an annual basis, others change every six months. These briefs paint a picture of such chaos that, as the Solicitor General points out, "it is appropriate for the Court to grant review here in order to resolve the uncertainty and minimize the adverse consequences created by the court of appeals' erroneous departure from the longstanding administrative interpretation of the LHWCA" (p. 9).

5. A problem which respondent and the amicus have carefully avoided is one of taxable income. If these union fund payments are to be treated as payments to the employee or of value to the employee, must not the employee be taxed on such payments, and must not the employer withhold taxes when such payments are made? These payments have never been treated in this fashion before, but the decision below would require an entirely new approach. Not only would this cause havoc for the employee, who must pay taxes on funds as to which he may never acquire a vested interest, but it would create incredible confusion for employers who would be burdened with the task of attempting to determine which payments are subject to withholding taxes and which are not. Because of increased federal income tax withholdings, employees hereafter would have a lower take-home pay then they do today.

6. Neither respondent nor amicus AFL-CIO has addressed our central core argument that the compensation a widow receives under this Act should represent what she lost by virtue of the employee's death. The question should be, for example, what is the value of a training fund to a deceased employee's widow? The obvious answer is "none". Our conclusion is pointed up by the fact that even the amicus cannot support the approach of the court below. That approach was to determine the value of the payment to the employee, whereas the amicus would attempt to determine the cost to the employer. Neither

approach is correct, as demonstrated not only by the Petition but by the brief of the Solicitor General.

In a similar vein, respondent makes much of the fact that the union fund payments were "negotiated benefits" (p. 2). We submit that it is utterly irrelevant whether the payments were negotiated or not. What counts is whether the payments were part of a standard of living which was lost by reason of the death. Respondent implies (*id.*) that the widow will now have to purchase privately what she lost when the employee died. But an apprentice training fund will never have to be purchased by a widow. Such a fund is for the enhancement of the employee's skills, not his widow's. The same applies to pension funds, in the sense that the widow has no vested right in them. With the passing of the employee, the pension abates.

7. Respondent is simply wrong in her reliance upon other statutes. The Davis-Bacon Act (p. 8) proves our point, not hers, because there Congress demonstrated its ability to include contingent interests by specific language when such interests were meant to be included. As for FECA (p. 9), no benefits under this statute have ever been awarded on the basis of union fund payments. Similarly, such payments have never been treated as wages for calculating premiums under the Social Security Act or ERISA (p. 10).

CONCLUSION

We submit that the various briefs supporting the granting of certiorari demonstrate, without question, that the interpretation placed on the LHWCA by the Court of Appeals is directly contrary to the intent of Congress when the Act was passed in 1927 and never changed since, as well as the interpretation followed by the Department charged with carrying out its mandate. In addition, the briefs show the impossible task that would be faced by the Government, industry and the courts in carrying out the strictures of the opinion below, as well as the burden that would ultimately fall on the employee to whose benefit the Act's provisions are supposed to accrue. A system of benefits previously noted for its clarity and its prompt and effective method of redress will be converted into a time-consuming, confusing and costly enterprise—unless this Court grants certiorari and reverses the judgment below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

June 9, 1982

TO ALL COUNSEL OF RECORD

No. 81-4258—Levis v. Farmers Export Co., Et Al.
No. 81-4273—Waters v. Farmers Export Co., Et Al.

Dear Counsel:

Because the issues and facts appear to the Court to be the same, in all significant respects, as the issues and facts in *Morrison-Knudson*, 81-1891, a case arising from the District of Columbia Circuit, in which the parties are now seeking writs in the Supreme Court, the Court will withhold decision in this case pending action by the Supreme Court.

Very truly yours,

GILBERT F. GANUCHEAU
Clerk

By /s/ Barry W. Stiebing
BARRY W. STIEBING
Chief
Judicial Support Division

/gta

Mr. Atreus M. Clay
Messrs. E.D. Vickery and
W. Robins Brice
Mr. Timothy T. Ryan
Ms. Agnes Kurtz
Mr. Milton J. Flick

MOTION FILED
MAY 13 1982

No. 81-1891

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
and
ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals
For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE and BRIEF OF AMICI CURIAE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
and
ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
and
SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals
For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE

Pursuant to Rule 36, United States Supreme Court Rules, the Alliance of American Insurers and the National Association of Independent Insurers seek leave to file a brief supporting the Petition and demonstrating that contributions to pension/health and welfare funds are not

"wages" within the meaning of Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(13). Consent of counsel for Petitioners has been received. Consent of Respondent Hilyer has been refused. The position of the Department of Labor is not clear.

Despite its designation as "Respondent," the Department has reversed its former position and now agrees that the decision below was wrong.[1] The Department's consent has been neither refused nor granted.

Movant Alliance of American Insurers is a trade association of 150

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[1] See, Supplemental Brief for the Director, Office of Workers' Compensation Programs, filed on April 29, 1982, in Duncanson-Harrelson Co. v. Director, OWCP, Ninth Circuit No. 79-7093. The Department's rationale appears as Appendix A to movants' brief.

property and casualty insurance companies incorporated under the Illinois Not-For-Profit Corporation Act. Movant National Association of Independent Insurers is a trade association of over 500 property and casualty insurance companies. Movants' member companies range from the very large to the relatively small and are engaged in the workers' compensation insurance business in all fifty states and the District of Columbia. According to most recent figures, movants' member companies underwrite approximately 45% of this nation's workers' compensation risks and provide about 36% of the compensation insurance required by employers subject to the District of Columbia Workmen's Compensation Act, 36 D.C. Code, §§ 501 et seq.

Movants offer a perspective on the issues not shared by any party. Movants' members participated in and supported

the 1972 reforms to the LHWCA benefit structure. Movants can show that the Court of Appeals' interpretation of Section 2(13) is unlike any definition used in that legislative process or at any time during the LHWCA's 55-year history.

Movants' members work with the LHWCA's provisions and administrators on a daily basis. Movants can show that the Court of Appeals' expansive definition of "wages" will provide most workers with a disability income exceeding the pay taken home from productive employment and will vastly increase the incidence of exaggeration and malingering. Movants can show that the decision below will force the reopening of hundreds of thousands of cases "closed" by Deputy Commissioners since 1972 and cause the collapse of the LHWCA's administrative framework.

The accompanying brief focuses upon two elements--the history of the 1972 Amendments and the content of the Comptroller General's April 1, 1982 Report on the LHWCA--not discussed by Petitioners. In addition, the brief discusses two major developments--the reversals of former positions by the Department of Labor and the Benefits Review Board[2]--which occurred after the Petition was filed and which both reflect and aggravate the confusion created by the decision below.

Movants' discussion of these elements and the impact of the decision on the costs and administration of thousands of claims will assist this Court in evaluating the merits of the Petition and assessing the need for immediate reversal.

---

[2] See pages 19-20 of Movants' Brief.

This Motion for Leave to File the accompanying Brief should be granted.

DATED: May 12, 1982.

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IN THE SUPREME COURT OF THE UNITED STATES
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No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
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ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals
For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

SUMMARY OF ARGUMENT

The Court of Appeals overlooked significant legislative history in reaching the conclusion that Mr. Hilyer's "wages" properly included the amounts

which Morrison-Knudsen contributed to the various union trust funds. The decision raises compensation benefits to a level exceeding "take home" pay and removes all economic incentive to resume work from most cases. The decision will require the recalculation of benefits payable in hundreds of thousands of claims long thought "closed" by the individual claimants, employers, and insurers.

Whether measured against traditional concepts of workers' compensation, the bases of the LHWCA's benefit structure, or the definition of "wages" used by all parties to 1972 amendments, the decision is wrong. Unless reversed by this Court, the decision will stress an already shaky system beyond its breaking point.

ARGUMENT

I.

THE DECISION BELOW DISREGARDS THE INTENT AND HISTORY OF THE 1972 AMENDMENT PROCESS AND UNDERMINES A BENEFIT REFORM BUILT UPON THE BASIC PREMISE THAT "WAGES" DO NOT INCLUDE CONTRIBUTIONS TO PENSION/HEALTH AND WELFARE FUNDS

Hundreds of millions of dollars have been paid to hundreds of thousands of workers since the LHWCA's benefit structure was reformed in 1972. These monies were paid on the basic premise--shared by all throughout the LHWCA's history--that the "wages" on which the proper rate of compensation depends do not include employer contributions to pension/health and welfare funds.

Although the effort to give precision to general language gains little from a review of the statutory definition's legislative background, there is convincing

evidence that the decision below is contrary to the meaning intended by Congress.[1] The Act's benefit structure received a great deal of congressional attention in 1972. The history of that year's amendments offers strong proof that the parties to the process were aware of the distinction between included "wages" and excluded "fringes." The parties based their debate about appropriate benefit levels and their ultimate agreement on the definitional premise that "wages" do not include contributions to pension/health and welfare funds.

This Court has already identified the three groups whose interests Congress sought to accomodate in 1972.

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[1] The Act's definition of "wages" has remained unchanged since adopted from its New York model in 1927.

The Department of Labor has prepared

> "The 1972 Amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the Amendments was not with the scope of coverage but with accomodating the desires of three interested groups: (1) shipowners who were discontent with the decisions allowing many maritime workers to use the doctrine of 'seaworthiness' to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties."
>
> (Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, at 261 (1977))

Vessel owners played little role in the process of revising the Act's bene-

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1 (continued)

an excellent summary of the pertinent history. See Appendix A.

fit structure. That dispute was between workers and employers and was limited to finding a mutually acceptable ceiling to an increase for which all acknowledged substantial need.

The key "employer" and "worker" roles in the process of agreeing upon the reformed benefit structure were played by a representative of the shipbuilding industry--Mr. Ralph Hartman[2]--and the spokesman for the AFL-CIO--Mr. Howard McGuigan.

Mr. Hartman and Mr. McGuigan spoke a common language when they discussed reformation of the benefit structure with Congress. Both thought that benefits should be increased to a level

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[2] Mr. Hartman later served as a member of the Benefits Review Board and wrote the opinion reversed by the decision below. Mr. Hartman now serves as Director, Office of Workers' Compensation Programs.

more adequately reflecting "wage" loss. Both defined their terms in testimony closely predating the Amendments themselves. Both distinguished between "wages" and "fringe benefits" and shared the premise that "wages" do not include the cost or value of employer contributions to pension/health and welfare funds.

Mr. McGuigan illustrated his complaint that the then-current $70 weekly maximum was inadequate when compared to prevailing "wage" levels with several tables reporting wages and earnings in the longshoring and shipbuilding industries and within the District of Columbia. Those tables specifically excluded contributions to pension/health and welfare plans from the "wage" base.[3]

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[3] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong.,

Mr. Hartman's testimony and his exclusion of those same contributions from "wages" was equally explicit.

> ". . . Currently, the reported average weekly wage in the shipbuilding and ship repair industry approximates $165, which rate covers straight time, overtime, shift work differentials, vacation and holiday allowances.
>
> * * *
>
> It must be recognized, of course, that there are additional weekly employer costs approximating $25 per week covering other contract-related benefits such as non-industrial health and accident insurance, pensions, and statutory costs such as Social Security and state and federal unemployment compensation. These costs continue during disability."
>
> (Senate Hearings, pp. 182-183, emphasis added)

The history is clear. Employer contributions to pension/health and wel-

---

2 (continued)

2nd Sess., U.S. Government Printing Office, 1972, pp. 99-110.

fare funds were not considered "wages" at the time the Act's benefit structure was overhauled.[4] The Court of Appeals overlooked this important legislative history and, as a result, adopted a definition which violated a basic premise of the benefit reforms enacted by Congress in 1972.

II

THE DECISION BELOW PERMITS MOST WORKERS TO "NET" MORE OFF WORK THAN ON AND ELIMINATES ANY ECONOMIC INCENTIVE TO RESUME PRODUCTIVE EMPLOYMENT

The Act's current condition was assessed by the Comptroller General in a

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[4] The premise that pension/health and welfare contributions are properly excluded from "wages" is shared by the insurance industry and reflected in its pricing practices. Premiums for workers' compensation and employers' liability insurance are based upon "payroll".

The National Council on Compensation Insurance--the primary workers' compensation rate-making authority--specifically

report issued April 1, 1982, pertinent portions of which appear as Appendix B. The Report focuses substantial attention on the current benefit structure and the problems that result when benefits available for disability begin to exceed "take-home" pay.[5]

Benefit levels which approach or equal full take-home pay replacement minimize return-to-work incentives and delay the return to productive employment. Benefit levels which exceed take-home pay encourage exaggeration and malingering.

---

4 (Cont'd)

excludes pension/health and welfare contributions from the proper "payroll" base.

5 "Take-home" pay equals gross pay minus federal and state income taxes, social security (FICA) taxes, and estimated deductions for union dues. Other job-related expenses such as transportation, child care, etc., are not deducted despite the fact that they end or decline during periods of unemployment.

The Comptroller General demonstrated that most workers now receive benefits averaging about 88% of pre-injury take-home pay.[6] The decision below involved contributions of 68 cents per hour, about 15% of Mr. Hilyer's apparent hourly wage. The cost of the parallel items required by the contracts governing longshore labor now exceeds $4 per hour, more than one-third of the "straight-time" hourly wage.[7] The impact of including contributions equaling 15% and 30% of "gross pay" is shown in the following table:

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[6] Appendix B, p. 16a, infra.

[7] Inclusion of the lower percentage as additional "wages" in 1980 would have raised the amount actually paid as compensation to 50,000 - 60,000 claimants by about $20 million. A 30% increment would have generated a much larger increase, about $60 million in that year alone. Unless reversed, the decision will have tremendous annual impact.

Average Wage (Selected Intervals)	Percent of Total Cases	PERCENT OF TAKE-HOME PAY REPLACED BY BENEFITS: COLUMN A* (Mr. Hilyer's "Fringe" Package)	COLUMN B** (Longshore "Fringe Package)
$ 1 - 50	0.38	129%	146%
51 - 100	2.48	127%	143%
101 - 150	11.26	131%	148%
151 - 200	12.02	100%	113%
201 - 250	16.60	95%	108%
251 - 300	18.51	98%	111%
301 - 350	12.40	100%	113%
351 - 400	10.31	102%	116%
401 - 450	4.96	105%	118%
451 - 500	3.24	107%	121%
501 - 550	2.86	110%	125%
551 - 600	1.91	113%	127%
601 - 650	1.34	115%	130%
651 - 700	0.57	117%	133%
701 - 750	0.76	120%	135%
751 - 800	0.38	122%	138%

*Column A - Weekly Benefit equals 66-2/3% of "Wages" including a 15% Pension/Health & Welfare Fund Contribution.

**Column B - Weekly Benefit equals 66-2/3% of "Wages" including a 30% Pension/Health & Welfare Fund Contribution.

The decision below will vastly increase the number of workers who receive more for not working than for labor performed.

For all but a relatively few workers, all economic incentive to resume employment will be erased. In the longshoring industry, the decision below will increase the typical worker's compensation benefits to a level at least 20% to 25% greater than the amounts taken home from a full week of productive work. There can be no justification for such a result.

> Even among those who contend that the scale of benefits is generally too low, there are few if any who would contend that anything resembling tort principles of amount of recovery should be imported into compensation law. It was never intended that compensation payments should equal actual loss, for the reason, if no other, that such a scale would encourage malingering.
>
> (1 Larson, Workmen's Compensation Law, § 2.50, pp. 11-12 (1964))

The delivery of compensation benefits exceeding average take-home pay is absurd.

That absurdity is inevitable unless the decision below is reversed.[8]

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[8] The absurdity of the Court's conclusion will strike both workers and employers.

If contributions to pension/health and welfare funds are "wages" within the meaning of 33 U.S.C. § 902(13), then the receipts from those same funds must also be "wages" within the meaning of 33 U.S.C. § 902(10):

> (10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. (Emphasis added.)

The receipt of "wages" should either (a) preclude an award of total disability [and a loss of the annual cost-of-living adjustments provided by 33 U.S.C. § 910(f)], or (b) assure that the employer or its insurer receives a credit for the amounts received from the fund.

Nothing in the history of the 1972 Amendments suggests that labor agreed to a benefit structure which provided employers with a right to offset pension benefits gained through collective bargaining against their statutory compensation liabilities.

III.

THE DECISION BELOW WILL REQUIRE THE RECALCULATION OF BENEFITS PAYABLE IN HUNDREDS OF THOUSANDS OF CASES "CLOSED" SINCE 1972, CAUSING THE COLLAPSE OF THE LHWCA'S ADMINISTRATIVE SYSTEM AND THE IMPOSITION OF A STAGGERING AND UNFORSEEN COST ON EMPLOYERS AND THEIR INSURERS

The amount of "wages" is central to nearly every LHWCA proceeding. Except in those cases involving workers with current annual incomes exceeding $38,000, the appropriate compensation rate is tied directly to the employee's own weekly "wages."

Administrative determinations of accurate "wages" and the calculation of the appropriate benefit rate are handled in accordance with the Department's Longshore Procedure Manual. The Manual

specifically directs the exclusion of pension/health and welfare contributions.[9]

About 96% of all longshore claims are "resolved" by Deputy Commissioners and their claims examiners. Since 1972, the Deputy Commissioners have had no authority to make final determinations of disputed issues. Claims resolved by Deputy Commissioners remain forever open. The amounts of "wages" upon which initial compensation rates are based remain forever subject to redetermination. Intercounty Const. Co. v. Walter, 422 U.S. 1 (1975).

Even those claims in which purportedly final orders have been entered remain subject to the Act's "modification"

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[9] The pertinent portion of the Manual appears as Appendix C to this Brief. Several hundred thousand cases have been informally resolved in accordance with the Manual's instructions.

provisions and eligible for reopening at any time within one year following the date of the last compensation payment in order to permit correction of any "mistake in a determination of fact." 33 U.S.C. § 922.

Modification remedies have been broadly defined by this Court. O'Keefe v. Aerojet General Shipyards, Inc., 404 U.S. 254 (1971); Banks v. Chicago Grain Trimmers Assoc., Inc., 390 U.S. 459 (1968). The Deputy Commissioner's determination of a compensation rate pursuant to an erroneously restrictive definition of "wages" would certainly qualify as a "mistake." Unless reversed by this Court, the decision below will require the reopening and recalculation of the benefits payable in hundreds of thousands of post-1972 "time-loss" cases.

The Department of Labor simply cannot perform the tasks involved in the massive effort mandated by the decision below. The number of "lost-time" injuries has nearly quadrupled since 1972. The Department's claims processing staff has grown by only 47%--to a total of 147 persons. This staff barely manages its current case load. The administrative staff and structure will collapse under the weight of thousands upon thousands of revived claims.

CONCLUSION--THE NEED FOR IMMEDIATE REVERSAL

The LHWCA must function or fail in a world of reality. Risks must be assessed and shared in advance of their materialization. Goods and services must be priced before the actual final cost can be known.

The evaluation of LHWCA risks and the pricing of the items which must absorb its costs have for more than half a century reflected the consensus that employer contributions to pension/health and welfare funds are outside the "wages" upon which the amount of compensation entitlement is based.

The inclusion of these contributions in the LHWCA's "wage" base will severely wrench an already unsteady compensation structure and create an absurdity--a system in which most workers "net" more off work than on.

The need for prompt action has heightened. Apparently believing itself bound by the Court's opinion below, the Benefits Review Board has reversed itself and ruled pension contributions within the LHWCA's "wages" definition. Minick v. Levin Metals Corp., BRB No. 80-835,

April 28, 1982. The Deputy Commissioners and Administrative Law Judges must follow the Board's lead. The decision below is about to become the "law of the land." Only this Court can prevent the disaster now facing the entire system.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 79-7093

DUNCANSON-HARRELSON COMPANY and EMPLOYERS MUTUAL LIABILITY AND INSURANCE COMPANY OF WAUSAU,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and NANCY A. FREER,
Respondents.

No. 79-7094

NANCY A. FREER,
Petitioner,

v.

DUNCANSON-HARRELSON COMPANY and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

SUPPLEMENTAL BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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* * *

ARGUMENT

THE EMPLOYER'S CONTRIBUTIONS TO THE PENSION TRUST FUND ARE NOT WAGES WITHIN THE MEANING OF SECTION 2(13) OF THE ACT BECAUSE CONGRESS DID NOT INTEND TO INCLUDE SUCH CONTRIBUTIONS IN WAGES AND BECAUSE THEY DO NOT POSSESS THE CUSTOMARY ATTRIBUTES OF WAGES

* * *

1. The inquiry begins with the language of the statute and is guided by the plain and ordinary meaning of the words Congress used. Richards v. United States, 369 U.S. 1, 9 (1961). In attempting to ascertain the legislative intent underlying a statute passed over 50 years ago, the definition of wages that was prevalent then is more enlightening than a more recent meaning. Cf. Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 280 (1980). Even if today wages are understood as "often including . . . amounts paid by the employer for insurance, pension, hospitalization, and other bene-

fits," Webster's Third New International Dictionary 2569 (1961), they were not always thus understood. The Congress that enacted the LHWCA would have had quite a difficult "plain and ordinary meaning" in mind.

Indeed, it would have been surprising if the 1927 Congress had thought about fringe benefits at all. An earlier version of Webster's dictionary defines wages without any reference to fringe benefits whatsoever. See Webster's New International Dictionary 2863 (2d ed. 1957) ("Pay given for labor, usually manual or mechanical, at short intervals, as distinguished from salaries or fees.").[7/]

7/ Webster's second edition was originally published in 1934 and remained unchanged until the third edition was published in 1961. See Webster's Third New International Dictionary, supra, at 6a, 7a.

Therefore, when Congress spoke of wages in 1927, it did not understand that term to include fringe benefits.

2. The legislative history of the 1964 amendment to Section 1 of the Davis-Bacon Act, 40 U.S.C. 276a.(b), which recounts the development of the role of fringe benefits, supports that conclusion. When enacted in 1931, Davis-Bacon did not define wages to include employer trust fund payments and employer fringe benefit costs. In 1964, Congress amended the statute expressly to define wages in those terms. See 40 U.S.C. 276a.(b). The Senate Report accompanying H.R. 6041, the bill that was ultimately enacted, indicates that fringe benefits were not mentioned in 1931 because they "were unknown" at the time. S. Rep. No. 963, 88th Cong., 2d Sess. 1 (1964).

* * *

Thus, the Congress that enacted the LHWCA, 4 years earlier, could not have "intended" that fringe benefits be considered wages. It is only since then that they have evolved to their present status of significance as compensation, and it is for Congress to make it clear, if that is its intent, that wages under LHWCA should now include fringe benefits.

Indeed, the very fact that Congress amended the Davis-Bacon Act to define wages as including fringe benefits suggests that the LHWCA similarly would require new legislation to reflect the more recent trend. This is especially so where employers, in choosing to be self-insurers, and insurance companies, in setting premiums, have ordered their affairs according to the long-standing practice of excluding fringe benefits from wage computations. See J.W. Bateson Co. v. United

States ex rel. Board of Trustees, 434 U.S. 586, 592-593 (1978). Cf. Potomac Electric Power Co. v. Director, OWCP, supra, 449 U.S. at 282 (one of employers' interests under the LHWCA is "having their contingent liabilities identified as precisely as possible."). "In the absence of some clear indication to the contrary [by Congressional action], we should not defeat these reasonable expectations." J.W. Bateson Co. v. United States ex rel. Board of Trustees, supra, 434 U.S. at 593.

* * *

3. Several practical implications of holding that wages include fringe benefits militate against doing so. First, the increase in total compensation payments occasioned by including benefits in wages may be enormous[11/] and must be borne by

---

11/ OWCP estimates the increase to range from $40-87 million annually.

employers, either in the form of higher insurance premiums or higher self-insurance costs. It seems highly probable that some employers would be unable to pass on or bear the extra costs and would be forced out of business.

Second, if wages are held to include fringe benfits, then the national average weekly wage, upon which the statutory maximum and minimum are based, should probably include those benefits as well. Even though the national average weekly wage is defined separately from wages, compare 33 U.S.C. 902(19) with 33 U.S.C. 902(13), it is likely that the same meaning was intended. See United States v. Cooper Corp., 312 U.S. 600, 606 (1941) ("The connotation of a term in one portion of an Act may often be clarified by reference to its use in others."). That would have the effect of raising the maximum and

minimum awards under the Act and would impose a difficult administrative burden on BLS, which calculates the weekly wage. When BLS attempted to determine average fringe benefit payments in the past, the delay between payments and determinations was over two years, an impermissibly long period under the Act. 33 U.S.C. 906(b)(3).

Last, the increased awards that result from including benefits in wages could increase the disincentive for non-fatally injured workers who otherwise might wish to return to work. Because compensation awards are not taxable income to the recipient, an injured worker receiving two-thirds of his benefit-enhanced wages could take home more than he would if he were working and paying tax on his

straight wages.[12/] The creation of such a disincentive is not in the public interest. Cf. Potomac Electric Power Co. v. Director, OWCP, supra, 449 U.S. at 290 n.9 (Blackmun, J., dissenting).

* * *

12/ Although this disincentive already exists for any worker whose average tax rate is at least 33-1/3%, the inclusion of fringe benefits in wages places more employees in this situation. For example, consider the disincentive that results from including the fringe benefits provided under the current collective bargaining agreement governing work by members of the International Longshoremen's Association in Atlantic and Gulf Coast ports. That agreement, which is midway through its three year term, currently provides for a $12.80 basic hourly wage, plus $4.59 per hour worked to be paid into the pension and health and welfare funds. (Locally negotiated fringe benefits and fringe benefits required by law are extra.)

Assuming a 40 hour work week, the longshoreman's wages before taxes are withheld would be $512.00. In the case of total disability under the LHWCA, the compensation rate (at 66-2/3%) would be $341.33. However, if the employer contributions are discontinued and instead are included in the computation, the base upon

12/ (concluded)

which the compensation rate is applied raises to $695.60 and would yield a weekly compensation rate of $463.63, or nearly 91% of pre-injury gross wages, tax-free. Of course, if the contributions are not discontinued, they should be excluded from wages in order to prevent the employee from receiving a double recovery.

APPENDIX B

REPORT BY THE
COMPTROLLER GENERAL
OF THE UNITED STATES

LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT NEEDS AMENDING

* * *

United States
General Accounting Office
HRD-82-25
April 1, 1982

* * *

COMPENSATION BENEFITS MAY DETER SOME EMPLOYEES FROM RETURNING TO WORK

Ideally, the benefits provided to a disabled worker would (1) allow a worker to maintain a standard of living somewhat comparable to the worker's standard of living before the disabling injury, (2) be less than the amount of the worker's previous income by the amount of work-related expenses, and (3) provide sufficient incentive for the worker to seek rehabilitation and prompt reemployment, where possible.[1/] The National Commission on State Workmen's

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1/ "White Paper on Workers' Compensation," prepared by an interdepartmental group from the Departments of Labor, Commerce, Health and Human Services, and Housing and Urban Development working on workers' compensation, May 1974.

Compensation Laws stated in its 1972 report[2] that the compensation provided to disabled workers must balance incentives to employers to improve safety--thus reducing compensation cost--with incentives to the disabled workers to use rehabilitation services and return to work.

Benefits approach, and may exceed, net earnings

The act provides for total disability compensation benefits, subject to minimums and a maximum, of 66-2/3 percent of gross pay. When this percentage was established, gross pay approximated net pay. However, primarily due to income taxes and social security taxes, the gap between gross and net pay has widened over the years. Thus, tax-free compensation benefits replace a higher percentage of net pay than they did in the past.[3] In addition, some workers are eligible for other benefits which, when combined with compensation, could result in benefits that substantially exceed preinjury net pay.

2/ "The Report of the National Commission on State Workmen's Compensation Laws," July 1972.

3/ Our report "Federal Employees' Compensation Act: Benefit Adjustments Needed to Encourage Reemployment and Reduce Costs" (HRD-81-19, Mar. 9, 1981) discusses a similar issue. Some of the data discussed in this section are taken from that report.

A March 1980 Labor survey of 550 closed cases (see p. 16) showed that compensation paid under the act, on the average, equaled 88 percent of preinjury take-home pay. The percentage of take-home pay replaced generally was higher at higher income levels.[4/] For example, a worker earning $272.70 a week received compensation equal to 85 percent of take-home pay, while a worker earning $524.40 a week received compensation equal to 96 percent of take-home pay.

If there were additional family income that would put a worker in a higher tax bracket, such as from a working spouse, taxfree compensation would replace a higher percentage of the employee's income. Also, such work-related expenses as commuting and child-care costs, which have increased over the years as people have tended to live farther from work and multiple-wage earner and single parent households have become more common, could be reduced.

In all States except two, workers who are temporarily or totally disabled generally received benefits equal to at least two-thirds of their predisability wages. Dr. Peter Barth, an expert in workers' compensation, has stated that nothing indicates that two-thirds of wages is high

---

4/ Workers with very low earnings received compensation that exceeded take-home pay because their tax-free compensation is 100 percent of their average weekly wage.

enough to be adequate and simultaneously low enough to offer workers some inducement to return to work as promptly as medically possible and that the same statement applies to any other wage percentage. He believes the two-thirds figure is used only because it is widely accepted and, in turn, widely recommended.

Evidence from private, long-term disability insurance programs indicates that high compensation rates cause disability incidence rates to increase. Private insurance plans with compensation rates over 70 percent of predisability gross income have incidence rates two-thirds above the average, while plans with compensation of 50 percent or less have incident rates one-third below the average. Because of this, private insurers generally attempt to limit disability benefits to 50 to 60 percent of gross earnings.

For some workers, benefits in addition to compensation could further increase income. A worker covered by the International Longshoremen's Association guaranteed annual income program would earn a minimum of $464 a week during the first year of its 1980 contract. A worker who was injured and unable to work, assuming earnings of $464 a week, would receive compensation under the act equal to two-thirds of that amount, or $309 per week tax free. In addition, the Association would supplement this compensation up to the guaranteed amount during the first year of injury. If the worker had a family of four, this supplement would amount to $155 gross or $141 net a week for a total of $450 per week. The worker's normal take-home pay would be $364 a week

after deductions for Social Security and Federal income taxes. Thus, the worker would receive $86 more a week than when working.

Employees who have been members of the International Longsoremen's and Warehousemen's Union for 13 or more years who become totally and permanently disabled are entitled to a disability pension regardless of the cause of disability. Such employees may receive both a disability pension and compensation benefits, after a 26-week offset period.

Additional benefits are also available under the Social Security Disability Insurance Program. If injured employees meet eligibility requirements, compensation can be supplemented up to 80 percent of gross wages after 6 months of disability.

It should be noted, however, that additional benefits would be available only in a limited number of cases. Of the 200 cases in our sample, only 4 percent involved disabilities that lasted longer than 6 months. Also, most workers covered by the act are not members of the unions and/or are not eligible for the union benefits described above.

The Labor study compared the percentage of predisability take-home pay that would be replaced at four different benefit levels with the percentage being replaced under the current method of compensation for 550 closed compensation cases.

Based on Labor's study, setting the compensation rate at a percentage of spend-

able income would appear to be more equitable, because the spendable income approach provides income replacement that remains fairly constant at varying income levels. The taxable income methods and the existing method provide higher replacement percentages as gross income increases until the maximum compensation rate is reached.

It is difficult, if not impossible, to state at what income replacement level employees will be most inclined to return to work only when his or her full wages are replaced. Even without accounting for savings from such work-related expenses as transportation and child care, some employees will prefer to remain away from employment for less than 100 percent of their net wages, especially in multiple-income households. Other employees will return to work as soon as physically possible, regardless of the economic disincentive to do so.

Based on Labor's study, the current level of benefits provides compensation that comes closer to full replacement of net earnings than to the 66-2/3-percent replacement anticipated when the act was passed. In addition to minimizing incentives to return to work, compensation that approaches take-home pay gives little recognition to a basic concept of workers' compensation that there should be some sharing of risk between employer and employee for work-related illness or injury.

Longshore Act: Average Weekly Benefit Received Under Current Method and Alternative Methods, Expressed As a Percentage of Take-Home Pay for Selected Wage Intervals of Employees with 2.5 Federal Exemptions in States With Graduated Income Taxes, Closed Cases

Weekly predisability gross pay, selected intervals	Percent of total cases	Average weekly predisability gross pay	Average weekly predisability take-home pay (note a)	Percent of average weekly predisability take-home pay replaced: Current method (66-2/3 percent)	80 percent of gross subject to Federal/State income tax	75 percent of gross subject to Federal/State income tax	85 percent of spendable income (note b)	80 percent of spendable income (note b)
$1 to $50	0.38	$ 27.00	$ 24.00	c/109	c/109	c/109	c/109	c/109
$51 to $100	2.48	82.62	75.31	c/110	c/110	c/110	c/110	c/110
$101 to $150	11.26	125.09	109.25	c/98	c/98	c/98	c/98	c/98
$151 to $200	12.02	171.60	142.95	81	91	86	88	82
$201 to $250	16.60	223.61	180.77	83	91	86	88	82
$251 to $300	18.51	272.70	214.98	85	91	85	88	83
$301 to $350	12.40	322.23	248.92	87	91	86	88	83
$351 to $400	10.31	372.96	282.47	89	91	86	88	83
$401 to $450	4.96	419.12	309.98	91	92	87	88	83
$451 to $500	3.24	473.35	348.23	93	94	89	88	83
$501 to $550	2.86	524.40	367.08	96	94	88	88	83
$551 to $600	1.91	581.00	397.10	98	94	90	88	83
$601 to $650	1.34	622.71	417.77	100	95	90	88	83
$651 to $700	0.57	677.33	443.31	d/97	95	91	88	83
$701 to $750	0.76	726.00	466.07	d/92	d/92	91	88	83
$751 to $800	0.38	788.50	495.31	d/87	d/87	d/87	d/87	83
Average all cases	-	285.95	239.26	88	93	88	90	85

a/Take-home pay equals gross pay minus Federal and State income taxes, social security (FICA) taxes, and estimated deductions for maritime union dues.

b/Spendable income equals gross pay minus Federal and State income taxes and social security (FICA) taxes.

c/Benefit amount is $106.56 (or the employee's actual wage if less than $106.56), which is 50 percent of the applicable national average weekly wage, the minimum payment established by the Longshore Act.

d/Benefit amount is $426.26, which is 200 percent of the applicable national average weekly wage, the maximum payment established by the Longshore Act.

APPENDIX C

Longshore (LHWCA) Procedure Manual
Part 1, Claims

Chapter 1-700
Determination of Average Weekly Wage

October 15, 1976

1-703. Annual Earnings. The average weekly wage is set at one fifty-second part of the employee's average annual earnings so computed. Any one or combination of the following are included in the term wages:

1) Cash wages and salary

2) Anything of value received as consideration for the work

A) Tips and bonuses

B) Room and Board

C) Car allowance (if it exceeds actual travel expense)

(contributions by the employer to pension and health plans are not included as wages. Refer to LS/HW Program Memorandum No. 32, dated June 17, 1968)

* * *

CERTIFICATE OF SERVICE

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IN THE

Supreme Court of the United States

October Term, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO: The Supreme Court of the United States.

American Insurance Association respectfully moves for an order granting leave to file an amicus curiae brief in the above-entitled case pursuant to Rule 36 of the Revised Rules of this Court. Consents of the attorneys for petitioners and the Federal respondent have been received. Consent of the respondent Hilyer has been refused.

The movant, American Insurance Association (AIA), is an unincorporated trade association of 150 property and casualty insurers. Its members represent a large percentage

of the property and casualty industry, particularly in the area of workers' compensation. The most recent figures available demonstrate that in 1980, AIA member companies wrote over $6 billion in direct workers' compensation premiums nationwide, including Longshoremen's and Harbor Workers' Compensation Act (Longshore) coverage, accounting for nearly 43% of the market for this type of insurance. While specific figures are not available, it is estimated that approximately the same percentage of Longshore coverage is written by AIA companies.

The AIA and its member companies are deeply concerned that the ruling of the District of Columbia Circuit Court of Appeals in *Hilyer* will place enormous stress upon an already over-burdened workers' compensation system.

It is the view of the AIA and its members that the practical effect of the *Hilyer* holding will be to defeat the primary purpose of the Act which is to provide a swift and efficient remedy to injured employees. The AIA, as amicus curiae, seeks to assist the Court by presenting a discussion of the adverse impact of the decision on the efficiency of the Longshore system in both the public and private sectors.

Petitioners and respondents are primarily expected to emphasize the merits of the Court of Appeals' decision vis-a-vis the facts of the instant case and their clients' respective interests, while discussing only peripherally the administrative implications of the court's ruling with even less attention being devoted to the economic and social ramifications. These issues, of utmost importance to the business community and insurance industry, will not adequately be presented by the parties, and it is for this reason

that the AIA moves this Court for leave to file the attached amicus curiae brief.

The attached amicus curiae brief of the American Insurance Association discusses the scope of the *Hilyer* decision, the purpose of the Longshore Act, the manner in which that purpose is defeated and the impact on all links in the compensation chain.

For the foregoing reasons, this motion for leave to file a brief as amicus curiae should be granted.

Dated: May 12, 1982

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BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Court of Appeals' decision, if left unreviewed, will result in a fundamental change in administration of the Longshoremen's and Harbor Workers' Compensation Act. The Act was intended by Congress to provide prompt and definite compensation benefits to injured workers in a legislative compromise between the interests of employers and Longshore workers. The Court of Appeals' introduc-

tion of the tort-like concept of "value received" by an injured worker as a basis for calculating his average weekly wages, and hence his compensation benefit rate, creates substantial factual uncertainty which Congress sought to avoid as it attempted swift and certain delivery of weekly disability benefits to injured workers.

Since the concept of average weekly wages is the starting point to the calculation of basic weekly benefits in every compensation case, the Court of Appeals' decision will affect all claims arising under the Act. The Court of Appeals' introduction of significant uncertainty into this base figure will have immediate and widespread consequences which will only result in delaying benefits and spawning additional litigation. The new approach to defining average weekly wages, which is contrary to 55 years of consistent administrative interpretation of the Act, will also cause an enormous administrative burden on the Department of Labor, and will result in the imposition of substantial unexpected costs to the Longshore industry and its carriers. For these reasons prompt review of the decision below and a reversal thereof are required.

ARGUMENT

I. SCOPE OF THE DISTRICT OF COLUMBIA CIRCUIT'S OPINION BELOW

The decision below, if left unreviewed, will have an immediate and widespread impact upon most claims presently being adjudicated under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), and require substantial retroactive adjustment of countless past claims which are now lying dormant. Although facially the Court of Appeals' construction of average weekly wages in the opinion below may appear to

be relatively tangential to the prime focus of the Act and of minor import, it actually effects a fundamental mutation in the administration of the Act.

As noted by the Court of Appeals, its decision in *Hilyer* addressed an issue of first impression at the Court of Appeals level. Petition Appendix C, p. 8a. The court held that the value of employer contributions to a Taft Hartley employee benefit trust fund must be included in determination of an employee's average weekly wages as computed under § 10 of the Act. Petition Appendix C, pp. 9a, 13a - 14a; 29 U.S.C. § 186(c)(5); 33 U.S.C. § 910.

The court held that one reasonable method of valuing the benefit to the employee of participation in the trust fund is to include the amount of the employer's contribution to the general fund in his average weekly wage calculation. Petition Appendix C, pp. 13a - 14a. Although the issue arose in conjunction with a death claim, the statutory provisions pertaining to calculation of average weekly wages do not differentiate between death claims and disability claims, and the court's interpretation would have universal applicability.

The statutory provisions pertaining to determination of average weekly wages were enacted in March, 1927, and have continued in their original form without material amendment.[1] 33 U.S.C. §§ 902(13), 910(a)-(d). Prior to the Court of Appeals' decision below, no reported decision

[1] When substantial amendments were made to the Longshore Act in 1972, Congress did not even discuss or address changing the original and administratively well settled concept of average weekly wages, although one of the major focuses of the amendments concerned the extent to which maximum and minimum benefits were to be increased. *See Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979). Significant discussion centered around comparative analyses of average weekly wage *levels* only, and, in that context, fringe benefits were either specifically factored out or the discussion of wages referred to tradi-

under the Act included fringe benefit contributions in an average weekly wage determination. When previously confronted with the issue, the Benefits Review Board uniformly rejected attempts to include fringe benefit contributions. *Waters v. Farmers Export Co.*, 14 BRBS 102, (1981), (*appeal pending* in 5th Cir., Nos. 81-4258 and 81-4273); *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), (*appeal pending* in 9th Cir., No. 79-7094); *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Hilyer v. Morrison Knudsen Construction Co.*, 6 BRBS 754 (1977); *Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977).

The Department of Labor, Office of Workers' Compensation Programs ("OWCP"), the Agency charged with administration of the Act, has maintained a consistent administrative interpretation of the Act excluding fringe benefits from average weekly wages, and has declined thus far to implement *Hilyer* pending Supreme Court review of the decision.[2] *See*, U.S. Department of Labor, LS/HW Program Memorandum No. 32 June 17, 1968. (Appendix A hereto) Examples of the implementation of average weekly wage calculations excluding fringe benefit contributions are strewn throughout reported case law, giving concrete form to the historical administrative interpretation. The Court of Appeals decision below necessarily

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tional concepts of gross earnings. *E.g.*, Legislative History of Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Committee Print Compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor (1972), pp 37-38, 62, 68, 98-111, 165, 501-506, 690-694; Legislative History of Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Committee Print Compiled for the House Committee on Education and Labor by the Select Subcommittee on Labor (1972), at 53, 63, 68, 73, 208-213, 266-270.

[2]The Department of Labor has argued in the 9th Circuit that the decision in *Hilyer* is wrong and should not be followed. *Freer v. Duncanson-Harrelson*, No. 79-7094.

would require a 180 degree reversal of 55 years of consistent application of the Act.

Average weekly wages must be determined in every workers' compensation case in which disability or death benefits are payable. The sole purpose for calculating average weekly wages under the Act is to set a statutorily defined figure from which all compensation benefits are to be calculated. 33 U.S.C. § 910. Disability benefits for temporary total or permanent total disability are calculated as 66-2/3 percent of average weekly wages. 33 U.S.C. § 908(a) and (b). Disability benefits for total or partial loss or loss of use of one or more scheduled members are statutorily defined to be 66-2/3 percent of average weekly wages payable for the number of weeks set forth in the listed schedule. 33 U.S.C. §§ 908(c)(1)-(19).

Disability benefits for permanent partial disabilities, other than those listed in the schedule, and benefits for periods of temporary partial disability, are calculated at the rate of 66-2/3 percent of the difference between a claimant's average weekly wages and his post-injury wage earning capacity. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980); 33 U.S.C. §§ 908(c)(21) and (e). The calculation of wage earning capacity for non-scheduled partial disabilities is determined either by an individual's actual post-injury earnings or by fixing a reasonable wage earning capacity based upon the facts of the case. 33 U.S.C. § 908(b); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649, (1979). In death cases, survivors' entitlement to compensation benefits range from 20 percent to 66-2/3 percent of average weekly wages, depending upon the nature of the survivor's dependency. 33 U.S.C. §§ 909(b), (c), (d).

Parameters are set by the Act defining maximum and minimum compensation rates, determined with reference

to the national average weekly wage, established annually by the Secretary of Labor. 33 U.S.C. § 906(b). Under the statute, disability benefits may not exceed 200% of national average weekly wages, and may not be less than 50% of national average weekly wages or a claimant's average weekly wages, whichever is less. 33 U.S.C. § 906(b). Death benefits may not be less than the national average weekly wage or the decedent's average weekly wage, whichever is less. *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979). A claimant receiving permanent total or death benefits is entitled to an annual benefit adjustment determined by the percentage increase in the national average weekly wage. 33 U.S.C. §§ 910(f)-(h). The national average weekly wage historically calculated by the Secretary of Labor has *never* included fringe benefit contributions.

With respect to prospective claims for disability or death benefits, the decision below is significant in *all* cases because in all cases average weekly wages must be determined as a basis for compensation benefits. Congress has recognized a massive increase in the number and significance of employee benefit plans, 29 U.S.C. § 1001, and reacted by enacting a detailed regulatory scheme. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* The United States Chamber of Commerce has calculated that *voluntary* fringe benefit payments in 1980, exclusive of statutorily required payments, were approximately 28% of payroll. Chamber of Commerce of the United States, *Employee Benefits, 1980*, p. 8 (1981) (1615 H Street, N.W., Washington, D.C. 20062).

Due to the pervasiveness of fringe benefit contributions throughout the work world, the decision below would significantly change the compensation rate calculated

from average weekly wages in many cases. In all cases of temporary partial or non-scheduled permanent partial disability, a fringe benefit calculation would also be necessary in conjunction with residual wage earning capacity. In such cases in would be necessary to investigate the relative "value" of fringe benefits before and after the injury to address loss in wage earning capacity. In all cases at the maximum or minimum rate, revision of the national average weekly wage to include all fringe benefits would be required and would alter the compensation benefits. The change in national average weekly wages would have the secondary effect of revising the annual adjustment for persons receiving permanent total disability benefits or death benefits. Inclusion of fringe benefits in average weekly wages would therefore be felt on a practical basis at not just one, but frequently two or more stages in workers' compensation cases.

The effect of the decision below upon prior compensation cases is, however, potentially more profound. Since the statutory interpretation defined a term which has been in the Act since its inception, there can be no doubt that the District of Columbia Circuit viewed its decision as having full retroactive effect. Under the terms of the Act, an award may be modified at any time during which compensation benefits are being paid, or up to one year after the last payment of compensation. 33 U.S.C. § 922. If no prior order has been entered, then an order revising benefits voluntarily paid may be entered *at any time* provided a timely claim was filed. *Intercounty Construction Co. v. Walter,* 422 U.S. 1 (1975). Consequently, the only past claims under the Act not subject to modification are those disposed of by award in which the last payment was made more than one year ago. The issues which are subject to reopening in these cases include average weekly

wage, residual wage earning capacity, maximum or minimum benefits and annual adjustments.

To bring national average weekly wages in line with the Court of Appeals decision below would require either retroactive recalculation of national average weekly wages by the Secretary of Labor, or a mammoth one-year adjustment to introduce fringe benefits and substantially alter the annual modification. 33 U.S.C. § 906(b)(3), 910 (f)-(h). The opinion below therefore not only inserts itself into numerous issues in pending and future cases but also may require re-activation of numerous dormant or uncontested cases for adjustment on one or more issues.

The Court of Appeals' holding in *Hilyer* expressly requires only that fringe benefit contributions of employers into Taft Hartley trust funds be included in calculation of average weekly wages. This, in itself, is serious enough. The most persuasive interpretation of *Hilyer*, and perforce its practical impact upon administrative fact finders, however, is that *Hilyer* mandates inclusion of any indirect perquisite in the average weekly wage calculation. Applied in that manner, the impact of *Hilyer* upon both present and past cases would be even more significant, and the several issues of average weekly wages, residual wage earning capacity, maximum and minimum compensation rates and annual adjustments would have to be re-examined in light of such incidental benefits as employer-provided group health policies, employer-provided group term life insurance, medical reimbursement plans, corporate profit-sharing and pension plans, continuing professional educational programs, travel allowance to professional conferences or meetings, unemployment compensation insurance, individual life insurance and related matters. These incidental benefits would arguably also extend to *de minimis* items, such as the value of company

picnics, social events, and the office coffee pot. There is incentive in the Act to pursue these items through the litigation process since attorneys' fees are assessed against the employer and carrier if counsel is successful in obtaining any additional benefits for the worker beyond what has been voluntarily paid. 33 U.S.C § 928(a).

Applying *Hilyer* logically and directly would even yield the more absurd result that average weekly wages must include employer premium payments for workers' compensation insurance, since this is clearly a benefit to employees, for it protects them against medical expenses and loss of wages for employment injuries, even if the injuries are solely their own fault. As noted by petitioners, Longshore compensation premiums in New York are already 86% of payroll, and would rise *above* payroll if *Hilyer* is accepted. Petition for Certiorari, p. 7; *See also, Wall Street Journal,* May 21, 1981, p. 26. The spiraling effect of including these premiums themselves in wage calculation would be substantial, and the end result would be that an injured employee might receive compensation benefits tax free in an amount substantially in excess of his actual pre-injury reportable *gross* earnings.

To apply the Court of Appeals' standard of attempting to determine the ethereal *value* to a claimant of an incidental benefit requires time-consuming analyses which are clearly repugnant to the self-executing purpose of the Act. Actual value to an employee can only be measured after taking into account such reductions as state and federal income taxes, social security, plus other payroll deductions. Net value to an employee of his employment would likewise have to take into account unreimbursed employee costs such as transportation to work, parking, tools, equipment, uniforms, etc.

Since factual investigation of these elusive principles could result in grinding the compensation system to a halt, amicus respectfully suggests that the concept of "value received by employees" used by the Court of Appeals is not the appropriate measuring standard for determining average weekly wages.

II. THE PURPOSE OF THE LHWCA IS TO PROVIDE A SWIFT AND MECHANICAL REMEDY

The LHWCA is designed to be a swift and mechanical remedy which attaches a specific dollar figure to an employee's average weekly wage, without the need for litigation or protracted negotiations. This Court, in *Norton v. Warner Co.*, 321 U.S. 565, 568 (1944), noted that the "design of the Act" was one of "encouraging prompt and expeditious adjudication of claims arising under it." In *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 476 (1947), in addressing the District of Columbia extension, the Court reiterated this principle:

> "A prime purpose of the Act is to provide residents of the District of Columbia with a *practical and expeditious remedy* for their industrial accidents and to place on District of Columbia employers a *limited and determinate liability.*" (emphasis added)

See also, Harrington v. Moss, 407 A.2d 658 (D.C. 1979). The emphasis in construing the Act should therefore be on preserving the nature of the remedy as one which affords a swift and readily determinable application.

In order to fashion a statute which would be acceptable to employers and would provide the speedy remedy desired, it was necessary to arrive at a compromise between the competing rights of employers and disabled

employees. This historical fact was recognized by this Court in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 n. 24 (1980) (*"PEPCO"*):

> 'Workmen's compensation acts are in the nature of a compromise or quid pro quo between employer and employee. . . . In return for a fixed schedule of payments and a fixed amount in the event of the worker's death, employers are made certain that irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries.' 1 M. Norris, *The Law of Maritime Personal Injuries*, § 55, p. 102 (3d ed 1975)."

In exchange for the employer's waiver of tort defenses the employee waived his rights to seek full tort damages. Promptness in the receipt of weekly benefits and certainty of the remedy were the consideration for the employee's acceptance of a smaller recovery.

The proper interpretation of the Act, therefore, should be to effectuate the statutorily enacted compromise and not to attempt, as does the *Hilyer* decision, to restore to the employee all "values received" from his employer prior to his injury. Petition Appendix, p. 8a. This Court stated this principle clearly in *PEPCO, supra,* at p. 281:

> "While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits on

> potential liability than would have been applicable in common-law tort actions for damages. None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of earnings."

This principle is also recognized by Professor Larson in his authoritative treatise:

> "A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others." 1 Larson, *Workmen's Compensation Law*, § 2.50, p. 11.

The LHWCA satisfied the purpose of compensation and recognized the importance of the compromise by establishing a readily determinable and mechanical formula for the calculation of benefits, based upon two-thirds of the employee's average weekly wage. 33 U.S.C. §§ 908, 910. Prior to *Hilyer*, the word "wage" was construed as intended – as dollar earnings – and could be calculated with simple reference to pay-stubs or W-2 forms. Given that interpretation, the compensation system functioned as a smoothly running machine, by swiftly, certainly, and correctly calculating and distributing weekly benefits to deserving injured workers.

III. HILYER DEFEATS THE PURPOSE OF THE LHWCA

The primary effect of the *Hilyer* case is to create uncertainty in an area where a simple, determinate and easily calculable formula is desired. As discussed in Section I,

supra, it is not established by *Hilyer* what types of benefits are now to be injected into the average weekly wage computation. In addition to questions concerning the type of benefits to be included, uncertainty is also created as to how the value of the benefits is to be determined. Although *Hilyer* says that it is "reasonable to measure [the] value by the amount of the employer's contributions", Petition Appendix, p. 14(a), it nowhere says that this is the *only* permissible method of calculation. It is easy to envision the myriad of imaginative valuation methods which will be urged by the litigants if *Hilyer*'s invitation is allowed to stand.

The *Hilyer* decision thus creates countless legal issues concerning what benefits are included in average weekly wage and countless factual issues as to how these benefits are to be valued. While the legal issues may ultimately be resolved through a long series of appellate cases, the factual issues will become a permanent fixture. The uncertainty thus engendered will invade every step in the administration of the LHWCA and destroy the Act's ability to provide a quick and efficient remedy to an injured worker in keeping with its "design" and "prime purpose." *Norton, supra*, p. 568; *Cardillo, supra*, p. 476.

In the vast majority of cases, compensation is voluntarily and automatically paid to the claimant, without an award or any litigation. *See* 33 U.S.C. § 914(a). Adversary action arises and the adjudicatory process is activated only when a claim is initially controverted or thereafter when voluntary compensation benefits are reduced or terminated. *See, e.g., Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980).

The first step in the adjudicatory process is the informal conference before a deputy commissioner. 33 U.S.C. § 919; 20 C.F.R. § 702.311 *et seq.* In 1981, while 56,000

lost-time cases were closed (excluding cases under the District of Columbia extension), only 8,300 informal conferences were held. United States Department of Labor, *1983 Budget Justifications of Appropriations Estimates for the Committee on Appropriations* (January 1982) ("*1983 Budget Justification*"), p. ESA-33. Thus, absent the injection of *Hilyer,* more than 85% of all lost-time claims were voluntarily and informally resolved without advancing to even this preliminary stage of litigation.

Given the unsettled legal and factual questions spawned by the *Hilyer* decision, it is naive to suppose that employers and carriers will, as in the past, amicably stipulate to the average weekly wage and forego the right to present evidence on valuation when a claimant is injecting fringe benefits into his wage calculation. It is equally naive to think that claimants' attorneys, with the incentive of employer-subsidized fees, 33 U.S.C. § 928(a), will accept tendered payments which include less than all "benefits", using the most expansive definition of the word. With *Hilyer* on the books, a greater percentage of cases will almost certainly proceed to the informal conference stage and beyond.

The informal conference, however, is not a dispositive proceeding since the end product is not a ruling, but merely a recommendation of the claims examiner or deputy commissioner. 20 C.F.R. § 702.316. Either party may reject the recommendation. The case then proceeds to the Office of the Chief Administrative Law Judge to be set for a formal hearing. It is at this level that formal fact-finding is held, and at which the parties may present their respective factual contentions relating to valuation of fringe benefits. In 1981, a total of 5,538 cases went before the nineteen Administrative Law Judges ("ALJ"s). *1983 Budget Justification,* p. DM-38. Of these, only 2,968 were disposed of. *Id.* Any major increase in the workload, such

as the opening of the floodgate activated by the *Hilyer* decision, will drown the ALJs beneath an impossible sea of cases. It is likely that the bulk of factual issues concerning average weekly wage, now avoided by the certainty of the Act, will require ALJ action, increasing the workload geometrically.

There is no reason for the losing party to stop at the ALJ's office, however, for each ALJ's decision is subject to review by the Benefits Review Board. 33 U.S.C. § 921. Every case raising a new type of benefit or combination of benefits, and a new method of valuation, will be a case of first impression. The party adversely affected will therefore certainly seek review by the Board. The Board, which in 1981 had a docket of only 1,002 cases, *1983 Budget Justification,* p. DM-42, will succumb to a crush of cases similar to that which will have buried the ALJs.[3]

The prospects for the OWCP are thus bleak if *Hilyer* is allowed to stand. An already overburdened and backlogged system will literally grind to a halt under the weight of *Hilyer*-inspired litigation. *See, e.g., Comptroller General's Report* at pp. 30-33. The 1981 figures are based upon 61,000 lost-time injuries covered by the Act (excluding the District of Columbia). The Department of Labor projects that there will be 67,000 such injuries in 1982 and 73,000 in 1983. *1983 Budget Justification*, p. ESA-33. These estimates do not include cases which will be reopened or reactivated under 33 U.S.C. § 922.

Ironically, however, the party damaged the most by *Hilyer* is the injured worker. In attempting to increase the worker's recovery by reinstating tort-style damages, the

[3]The head of the Board independently estimated that 96% of all claims are resolved before reaching the ALJs. He estimates that 1% reach the Board and 0.1% reach the U.S. Court of Appeals. Report by the Comptroller General of the United States, "Longshoremen's and Harbor Workers' Compensation Act Needs Amending", April 1, 1982 (*"Comptroller General's Report"*), p. 5.

Court of Appeals has inadvertently but undeniably reinstated the tort-style timetable. Instead of the immediate benefits the claimant bargained for and obtained through the compromise embodied in the Act, a slow litigation process through an overburdened system will be necessary, during which time the claimant may well have no means of support. The Act was designed to avoid just such a result:

> ". . .contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged." *Norton* v. *Warner, supra*, 321 U.S. at 569.

Rather than discouraging contests and delays, the *Hilyer* case invites them by fostering uncertainty in the benefit calculation formula. The once easy computation of average weekly wages will become the subject of floods of litigation, the impact of which will be to cripple the administrative process and to defeat the very purpose for which the Act was created.

IV. Impact on Industry

The impact of implementation of the Court of Appeals' holding in *Hilyer* upon industry would be of a different, but nonetheless substantial, nature. Even before *Hilyer*, the LHWCA was notorious for its high costs. For example, as of January 1, 1978, for various types of business, District of Columbia workers' compensation insurance premium rates under the D.C. Extension of the Act varied from 127% to 431% of their Maryland and Virginia counterparts. From 1973 to 1979, workers' compensation insurance premiums in the District of Columbia increased in excess of 600%. 126 Cong. Rec., February 7, 1980. (H 745); *see also, Comptroller General's Report,* pp. 8-19

(Longshore insurance costly and difficult to obtain). Based upon the the U.S. Chamber of Commerce survey indicating that fringe benefits constitute an average of 28% of payroll, *Hilyer* would have the immediate effect of increasing workers' compensation premiums at least by that amount, since premium calculations are based directly on payroll.

With respect to most Longshore trades, where fringe benefits exceed 50% of wages, the resounding effect on premiums would be more profound. If *Hilyer* is applied more broadly than just to Taft Hartley trust funds, the effect would be more substantial still. The administrative costs to insurers in handling the new factual issues posed would further increase premiums, as would administrative and legal costs incurred for retroactively adjusting prior claims.

Substantially increased premiums will likely have the two-fold effect of driving employers from the trade and making it impossible for those who stay to obtain voluntary insurance. For example, in testimony before the District of Columbia's City Council's Committee on Housing and Economic Development, exploring the need for a new Workers' Compensation Act in the District of Columbia, the Executive Director of the Mayor's Office of Business and Economic Development concluded that from 1970 to 1976, the District of Columbia lost 108 firms and approximately 15,000 jobs, an estimated loss of $180 million in payroll per year, due in substantial part to already unnecessarily high premiums. 126 Cong. Rec., February 7, 1980 (H 745); Report, Committee on Housing and Economic Development on Bill 3-106, The District of Columbia Workers' Compensation Act of 1979, January 8, 1980, pp. 3, 4. ("Committee Report"). Difficulties ex-

perienced by private employers in the District of Columbia in obtaining voluntary workers' compensation insurance from individual insurance companies were evident from statistics of the District of Columbia Department of Insurance indicating that in 1975, 568 private employers were insured by the assigned risk pool, whereas by 1978, the number had grown to 24,000. Committee Report, *supra*, p. 5.

With respect to those few employers who are subject to retroactive premium adjustment based upon payroll audit, Hilyer would cause a retroactive surcharge in premiums for those incidental benefits, costs for which employers have not budgeted in their business planning. Insurance carriers will likely suffer the substantial brunt of retroactive adjustment in average weekly wage, however, as the bulk of past premiums are not subject to chargeback. Carriers will therefore be required to pay additional compensation benefits based upon a payroll base far in excess of that for which premiums were collected.

The complex system of setting reserves from which to pay claims is already more significant in workers' compensation insurance than in other areas due to the significantly longer payout period on workers' compensation cases as opposed to the single payment practice in life and casualty insurance. Reserve requirements will have to be adjusted retroactively to account for *Hilyer*, and substantial assets will have to be set aside to comply with various statutory reserve requirements. *E.g.*, D.C. Code § 35-1530; *See, e.g.*, R. Strain, *Property - Liability Insurance Accounting*, Chapter 3, "Estimated Liabilities for Losses and Loss Adjustment Expenses" (by Ruth Salzmann), pp. 29-79 (1974); *see, generally*, Couch, *Insurance* § 21:35; 44 C.J.S. Insurance, § 102; 43 Am.Jur.2d, Insurance § 62.

Reopened claims, which would be encouraged by *Hilyer*, pose particular problems in the workers' compensation insurance field. Strain, *supra*, pp. 33-34. Since premiums will not have been collected for this retroactive adjustment, the reserves and the ultimate payout will come from the carrier's surplus rather than its previously calculated reserves for payment of claims.

The Court of Appeals' decision in *Hilyer* below effects a basic and fundamental change in workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. If left unaltered, it will have an immediate effect not only upon the administration and procedural application of the Act, but on the insurance premiums and benefit costs to industry. This will increase by *at least* the 28% figure represented by the U.S. Chamber of Commerce survey of fringe benefits, and it will probably do so at even a greater rate due to the retroactive applicability and the virtual lack of logical limitation on the Court of Appeals' "value to the employee" approach to average weekly wages.

CONCLUSION

The Court of Appeals decision marks a substantial departure from 55 years of consistent application of the average weekly wage provision of the Act and will have a profound and chaotic effect upon the administration of the Act. The issue cannot await further ripening. A decision by this Court is imperative now.

The Petition for a Writ of Certiorari should be granted.

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APPENDIX A

COM-P-6
X COM-P-6-8
X COM-P-6-8, Sec.2(13)
X COM-P-6-8, Sec.10
X ADM-8-4

U.S. DEPARTMENT OF LABOR
Wage and Labor Standards Administration
Bureau of Employees' Compensation
Washington, D.C. 20211

June 17, 1968

LS/HW PROGRAM MEMORANDUM NO. 32
SUBJECT: Computation of Pay Rates –
Fringe Benefits –
LS/HW Compensation Act - Sections 2 (13) and 10

Quoted below is the Associate Solicitor's advisory opinion of March 18, 1968:

> "You ask whether pensions, dental care, medical care, and other fringe benefit contributions by employers should be included in computing the average weekly wage for computation purposes.
>
> "Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act reads as follows:
>
> > " 'Wages' means that money rate at which the services rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

"We feel that it would be improper to assert the inclusion of pension and health plan contributions by the employer

in computing wages though there is support for including such contributions in wages. *United States v. Carter* 353 US 210 (1957) concerned the extent of the liability on a payment bond furnished by a contractor, as required by the Miller Act, for the protection of persons supplying labor for the construction of federal public buildings. The collective bargaining agreement under which the laborers were hired obligated the contractor to pay 7½ cents per hour to the trustees of a health and welfare fund established for the benefit of the laborers. It was expressly stated that the contributions 'shall not constitute or be deemed to be wages' due the employees. The Court stated that 'the parties have stipulated what contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. That the unpaid contributions were a part of the compensation for the work to be done by Carter's employees is emphasized by the fact that their amount was measured by the exact number of hours each employee performed service for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective bargaining agreements'.

"In *Inland Steel Co., v. NLRB,* 170 F.2d 247 (1948), it was held that pension payments by the employer were wages as well as 'other conditions of employment' within the meaning of the National Labor Relations Act.

"In Senate Report 963, 88th Cong., Second Sess., regarding amendments to the Davis-Bacon Act, at page 3, it was said that 'regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation'.

"Payments to these funds are not only a substitute for direct wage increases which workers would otherwise have received; but, in addition, these payments are now a very large part of the hourly wage costs for the industry. A

typical Longshore agreement reveals a basic wage of $3.50 per hour, and welfare and pension fund contributions of $.83 per hour.

"In *United States v. Embassy Restaurant*, 359 US 29 (1959), the Supreme Court held that contributions by an employer to a union welfare fund which were required by a collective bargaining agreement were not entitled in bankruptcy to priority as being 'wages . . . due to workmen' under the Bankruptcy Act. The contributions were flat sums of $8 per month for such workmen, without relation to their hours, wages, or productivity. Because they were due to trustees not to workmen, the court ruled that these unpaid contributions were not wages due to workmen. A strong dissent was registered. The Longshore Act does not require that the wages be due to the employee; thus mitigating this case as authority for the present situation.

"However, other factors and policy considerations must lead us to the view that we should not include employer contributions to pension funds and for other fringe benefits in computing the average weekly wage rate.

"In determining the wage paid to employees with regard to the Fair Labor Standards Act, which defines wages as including the reasonable cost to the employer of furnishing the employee with food, lodging or other facilities, reference should be made to the letter from the Administrator of May 22, 1967, which says:

> 'As pointed out in section 531.32; other facilities are used in section 3(m) must be something like board and lodging. Contributions to pension plans or group life, disability, or other insurance plans do not constitute the reasonable cost or fair value of facilities furnished which may be credited under section 3(m) of the act toward the applicable minimum wage which section 6 requires to be paid free and clear on the pay day for each workweek'.

"Note however, that the FLSA requires that the wages be paid 'free and clear,' while the Longshore Act does not contain such an express requirement.

"Before 1964, fringe benefit contributions were not part of wages under the Davis-Bacon Act. Since it was generally felt that such contributions should be part of wages, Congress passed an amendment to the Act including them as such.

"In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. Since we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices".

/s/ _____
John J. Newman
Assistant Director, LS/HW

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IN THE

Supreme Court Of The United States

October Term, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER

Respondents.

BRIEF OF AMICUS CURIAE THE METROPOLITAN WASHINGTON COUNCIL, AFL-CIO IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether employer contributions of a specific money amount per hour worked to union pension and/or welfare funds pursuant to a collective bargaining agreement are "wages" within the meaning of Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act.

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IN THE

Supreme Court Of The United States

October Term, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER

Respondents.

BRIEF OF AMICUS CURIAE THE METROPOLITAN WASHINGTON COUNCIL, AFL-CIO IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Amicus Curiae the Metropolitan Washington Council, AFL-CIO respectfully submits the following views regarding *Morrison-Knudsen Construction Co. v. Director, OWCP, United States Department of Labor,* No. 81-1891.

INTEREST OF THE AMICUS

Metropolitan Washington Council, AFL-CIO is a labor organization representing over 151 unions in the Metropolitan District of Columbia area. These 151 unions have a combined membership of over 400,000 persons. Those members who work regularly in the District of Columbia are covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1976), as made applicable to the District of Columbia by the District of Columbia Workers' Compensation Act, D.C. Code § 36-501 (1973).

Metropolitan Washington Council, AFL-CIO has received written consent form Petitioners Morrison-Knudsen Construction Company and Argonaut Insurance Company and Respondent Sonia Hilyer to file this brief as *amicus curiae.* Copies of these letters have been filed with the Clerk of the Court.

THE STATUTE INVOLVED

This case involves the proper construction of Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(13), which provides as follows:

> SEC. 2. (13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

SUMMARY OF THE ARGUMENT

Despite petitioners' claims, the *Hilyer* decision's impact on employers, insurance companies, and the administration of compensation claims will not be unduly burdensome. Further, the small percentage increase in average weekly wage figures required by *Hilyer* in specific and limited circumstances will not be difficult to calculate or result in a windfall to employees.

More importantly, the *Hilyer* decision is clearly correct and raises no important or novel question of federal law. The broad language in the definition of "wages" and the remedial purpose of the Longshoremen's Act evidence Congress' intent that "wages" include all reasonably identifiable and calculable compensation bargained for by the employee. Moreover, if the employee's compensation did not include employer contributions to fringe benefit funds, the employee would receive this amount as additional direct pay. Either way the employer's hourly labor costs are the same. Accordingly, the mere fact that the employee chooses to receive part of his compensation indirectly must not result in the employee receiving lower disability payments. This conclusion is reinforced by the fact that the employee loses the fringe benefits coverage when he is not working. Consequently, the lower court properly held that "wages" include all value received as compensation by the employee that is reasonably identifiable and calculable. For these reasons, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THE IMPACT OF THE LOWER COURT'S DECISION IS DE MINIMUS

Petitioners and the *amici* in support of the petitioners drastically overstate the effects of the decision below and the minimal administrative adjustments it may require. Their doomsday scenarios and extensive criticisms ignore the simple fact that the *Hilyer* decision merely requires, in limited and specific circumstances, the addition of certain readily calculable items to the broad category of employer compensation constituting "wages" under the Longshoremen's and Harbor Workers' Compensation Act. ("LHWCA" or "the Act"). 33 U.S.C. §901 *et seq.* (1976).

First, the *Hilyer* decision, by including certain employer contributions to pension, health and welfare, and training funds in the calculation of an employee's average weekly wage, affects only those employees who are in receipt of these fringe benefits. This by no means includes every employee covered under the Act. Rather, the decision affects only employees who, pursuant to a collective bargaining agreement or similar contract, have their employer pay fixed amounts to these funds in lieu of the employees receiving that money directly as pay. Consequently, the effects of the *Hilyer* decision are first contingent on particular employee compensation arrangements.

The scope of the decision below is further limited by the lower court's clear implication that only employer contributions measured in hourly amounts and tied to the employee's hourly work are to be included in the calculation of the employee's average weekly wage. Moreover, the employer contributions constituting "wages" are only

those precipitating specific tangible benefits bargained for by the employees. It is plainly ridiculous to state, as one *amicus* has, that given *Hilyer* the value of such benefits as the office coffee pot must also be included. The *Hilyer* court intended only tangible benefits bargained for by the employee in lieu of higher straight pay to be included as part of the employee's "wages".

The addition of these employer contributions to the definition of "wages" makes an employee's average weekly wage no more difficult to calculate. The prior concern of the Benefits Review Board (the "Board") and of the petitioners, that the value of these contributions cannot be accurately measured and that the Act's design as a mechanical and expeditious remedy is thereby destroyed, is totally groundless. Quite simply, as the lower court noted, the value of these contributions is measured by the amount of the employer's contribution to the various fringe benefit funds. *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (D.C. Cir. 1981). It is not necessary, and certainly not logical, to attempt to ascertain some abstract measure of value to the employee of the employer provided benefits coverage. Rather, because the employee's economic advantage lies in the gain of such coverage *in lieu of higher straight pay,* with which the employee would have to purchase his own coverage, the employee's immediate economic gain is easily determined by looking to the amount of the employer's hourly rate of contribution to the various funds. Thus, the additional calculations require no more than looking to the employer's books or the union contract to determine this rate. This determination is clearly less speculative than calculating the value to the employee of the use of a car, which has been held to constitute "wages" under a similar state workers' compensation statute. *Leslie v. Reynolds,* 179 Kan. 422, 295 P.2d 1076 (1956).

Similarly, the lower court properly allayed the Board's fear that by including these contributions in the definition of "wages", the calculation of average weekly wage pursuant to Section 10(b) would require the finding of a fellow employee who had a similar status vis a vis the union funds. As the court of appeals noted, because the contributions are made on a per-hour basis for each employee, the contributions are included in the average weekly wage "simply by determining the amount of contributions made on behalf of the fellow employee who, having worked similar hours, serves as the referent in any event." *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d at 213. In short, the employer contributions are made without regard to the employee's status in relation to the funds. Accordingly, the fear that the lower court's decision complicates the Section 10(b) determination is also groundless.

More importantly, it is simply not true that in light of the *Hilyer* decision employees will receive more compensation while out of work than they received while working. This fear misapprehends the value of fringe benefits to the employees and the terms under which the employer makes contributions to the benefit funds. The assertion implies that, for example, the health insurance coverage is worth nothing unless and until benefits are paid. This is clearly erroneous. The value to the employee of the insurance coverage is in its *protection;* namely, in the fact that the employee does not have to purchase private insurance coverage. Accordingly, while under the *Hilyer* decision the employee may receive a higher dollar amount of disability payments, this amount will not accurately reflect what the employee is receiving in light of what he has lost. This is because, pursuant to virtually every contract providing for employer contributions to fringe benefit funds, the

benefits are lost when the employee is not working. Thus, by being out of work, the employee suffers the loss of critical insurance coverage and must buy his own private insurance protection. Further, private insurance rates are generally higher than the group rates available to employers. Consequently, any nominal gain to the employee in higher disability payments is outweighed by the cost of purchasing similar private insurance. Therefore, fears that *Hilyer* will be incentive for employees to remain off work are groundless.

In this light, it is clear that the court included as "wages" what the employer *actually pays* on a hourly basis, when reasonably identifiable and calculable, as opposed to what the employee may nominally receive. This is because the latter is deceiving as an accurate measure of the employer's compensation for the employee's services. The key point is that the employee loses the fringe benefits if he is not working. If the employer contributed to the benefit funds on behalf of the employee whether or not the employee was working, the amount of the contributions would not be included as "wages". In such a case the employee's "wages" would still be tied to what the employer actually pays the employee on an hourly basis, and the employee would not have to use his disability payments to purchase private insurance.

It is thus clear that the *Hilyer* decision will not result in a windfall for employees at the expense of employers and insurance companies. In fact, *Hilyer* takes away from employers an unjustified benefit they have long been receiving at the expense of their employees. Prior to *Hilyer* if an employer's total hourly labor cost per employee was nine dollars in pay and one dollar in contributions to various benefit funds, when the employee was disabled, the disability payments were based on only

nine dollars. Furthermore, as noted above, the employee lost his insurance coverage and had to purchase private coverage out of the disability payments. The *Hilyer* decision merely requires that the disability payments be based on the employer's total labor cost of ten dollars, which figure more accurately represents the employee's true hourly "wages".

Finally, the inclusion of employer contributions to various benefit funds is directly analogous to the inclusion of vacation and overtime pay, which have long been held to be included as "wages". *Baldwin v. General Dynamics Corp.*, 6 BRBS 396, BRB Nos. 76-271/A (August 4, 1977); *Ward v. General Dynamics Corp.*, 9 BRBS 569, BRB No. 78-394 (December 29, 1978).

In sum, the *Hilyer* decision's impact on employers, insurance companies, and the administration of compensation claims will not be unduly burdensome. Despite petitioners' fears, the small percentage increase in average weekly wage figures required in the limited and specific circumstances noted above, will neither be difficult to calculate nor a windfall to employees. Further, neither the insurance industry nor the Office of Workers' Compensation Progams will collapse under the weight of this small adjustment. Simply, the lower court carefully concluded that in those situations where an employer contributes on an hourly basis amounts to various benefit funds, as bargained for by the employees, such amounts shall be included in the calculation of average weekly wage. This is not the stuff from which doomsday scenarios are convincingly made.

II. THE DECISION BELOW WAS CLEARLY CORRECT

Given the Act's broad definition of "wages" and its remedial purpose the lower court properly held that certain employer contributions to benefit funds constitute "wages". This conclusion is reinforced by the plain language of Section 2(13) and by cases interpreting "wages" under the LHWCA and similar state workers' compensation acts.

Most importantly, it must be recognized that if the employee did not contribute the hourly sums to the various funds, the employee would receive that additional amount in his paycheck. In such a case, it is indisputable that the whole amount would constitute "wages". It is only because the employee's collective bargaining representative negotiated the employee compensation in terms of both direct pay and indirect contributions to benefit funds, that the employee does not presently realize the whole amount in his paycheck. As noted in Part I, *supra,* however, either way the employer's hourly labor costs are the same. Accordingly, the employee's disability benefits should not be reduced merely because the employee chooses not to receive all the bargained for compensation directly.

Moreover, the lower court properly recognized that if the money contributed to the funds went directly to the employee, and then the employee contributed it to the funds, that amount would be included as part of the employee's "wages". As the lower court further recognized, this result cannot change "simply because the company has agreed to eliminate two unnecessary steps by paying the contributions directly to the trust funds." *Hilyer v. Morrison-Knudsen Construction Co.,* 670 F.2d at 212. This is surely correct. The Supreme Court reached this same conclusion in holding that employer contributions to

similar union health and welfare funds were "sums justly due" to employees under the Miller Act, 40 U.S.C. § 270a *et seq. United States v. Carter,* 353 U.S. 210 (1957). In so holding, the Supreme Court noted that:

> The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been "paid in full" for their labor in accordance with the collective bargaining agreements.

Id. at 218. The same holds true here. Therefore, for the purpose of Section 2(13), the lower court correctly characterized the employer contributions as equivalents to direct compensation payments to the employee.

The lower court's holding is further compelled by the fact that the employer's contributions relieve the employee of the burden of purchasing similar health and retirement coverage. Part I, *supra.* This point was emphasized by the United States Court of Appeal for the District of Columbia in its earlier holding that the value of food regularly furnished restaurant employees constituted part of "wages" under the LHWCA. *Harris v. Lambros,* 56 F.2d 488 (D.C. Cir. 1932). The Court stated:

> [H]ere we have a case in which employees, by reason of the nature of their employment are relieved of the burden of providing food for themselves. . . . [T]he whole purpose of the Act is to provide indemnity to an injured employee based upon the wage loss sustained by him as a result of the injury, and to an employee of this defendant the loss in such case would not be his wages alone, but his wages and his food, since

> each was a benefit which he enjoyed while employed and is deprived of when injured.

Id. at 489. Accordingly, if the employer's contributions to the various funds are not included as part of "wages", the employee must deplete the disability payments in order to secure the benefits previously provided by the employer. In such a case, the employee's disability payments do not accurately reflect the employee's true loss. *See, Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888, BRB Nos. 76-314/A (January 31, 1979) (Miller dissenting).

It is also significant that generally, when wage increases are negotiated by the employee's collective bargaining representative, it is left to the representative to determine what portions of the hourly increase shall be allocated to pay and what portions to various fringe benefits. *Id.* This further supports the point that these fringe benefit contributions must be included as "wages" to accurately reflect the employee's bargained for compensation.

In reaching its decision, and with particular regard to pension fund contributions, the lower court cited *Hite v. Evart Products Co.*, 34 Mich. App. 247, 191 N.W. 2d 136 (1971). In *Hite,* the court addressed the identical issue presented here. The court held, *inter alia,* that employer contributions to a pension fund and a group insurance plan were to be included in determining average weekly wage. The court stated that even though an employee was not eligible for a pension until after ten years of employment, the fact that prior to that time the employer was putting aside specific sums for this potential benefit required the inclusion of that hourly amount in the computation of the employee's weekly wage. This followed in that as a result of the injury, the injured employee had to find some other way of providing income for retirement. The same reasoning followed for the employer's contribu-

tions to the group insurance plan. Directly on point, the *Hite* decision was properly persuasive for the lower court.

Cases interpreting the plain language of Section 2(13), and nearly identical language in state workers' compensation statutes, reinforce the basic fact that the definition of "wages" was intended to be flexible and include all economic gain which is "reasonably identifiable and calculable." It cannot be argued that because employer contributions to benefit funds is not listed in Section 2(13) they were intended to be excluded. The Benefits Review Board has already expanded Section 2(13) in holding that vacation pay and overtime pay constitute "wages". *Baldwin v. General Dynamics Corp., supra; Ward v. General Dynamics Corp., supra.* Additionally, the Board has held that automobile parts, received as recompense for services rendered, were an "advantage" received falling within the definition of "wages". *Carter v. General Elevator Co.,* 14 BRBS 90, No. 78-597 (August 3, 1981). Clearly the Board has always maintained that the definition of "wages" was intended to be very broad.

State court opinions are consistent with this broad interpretation of "wages". In *Richmond v. Weiss & Goldring, Inc.,* 124 So. 2d 601 (La. App. 1960), the court stated that in computing the wage basis under the state's workers' compensation act, there should be included not only wages and salary, but anything of value received as consideration for the work. As authority, the court cited 2 *Larson, Workmen's Compensation Law* § 60.12 (1952) Similarly, an Arizona court stated that included "in the computation of average monthly wage is anything constituting real economic gain to the claimant." *Harvey Auto Supply v. Industrial Commission,* 25 Ariz. App. 274, 542 P.2d 1154 (1976). This court also cited Larson's treatise as authority. In this light, the lower court's characterization

of "wages" as value received by the employee which is "reasonably identifiable and calculable" is clearly correct.

Petitioners attempt to make much of their own interpretation of the LHWCA's legislative history, stating that Congress never intended fringe benefits to be included under Section 2(13). For several reasons, this view is erroneous. First, the plain language of Section 2(13) states that "wages" include "similar advantage received from the employer." This clearly evidences Congress' intent that the definition of "wages" be flexible. The Board has reaffirmed this intent by including overtime and vacation pay within Section 2(13), despite their omission by Congress. Secondly, when the Act was first enacted, few, if any, fringe benefits were provided by employers. Now, however, they are relatively common. Thus, these benefits are just the type of "similar advantage" intended by Congress to be encompassed in the flexible definition of "wages". In sum, there is no evidence that Congress did not intend the term "wages" to be flexible over time, given the broadness of the definition. Rather, Congress intended to compensate injured employees by including within the calculation of average weekly wage all compensation of identifiable value.

This view is strongly supported by the general principle that the Act must be liberally construed in conformance with its humanitarian and compensatory purpose. *Voris v. Eikel,* 346 U.S. 328 (1953); *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977). Thus, in interpreting and applying the provisions of the Act, the statutory terms should be given broad application in order to accomplish the remedial aims of the statute. *Michigan Mutual Liability Co. v. Arrien,* 233 F.Supp. 496 (S.D.N.Y. 1964), *aff'd,* 344 F.2d 640 (2nd Cir.), *cert. denied,* 382 U.S. 835 (1965).

As several state courts noted, this principle should be equally applicable to the computation of an employee's wage base. *See, e.g., Dixon v. Postlewait Glass Co.*, 241 Mo. App. 174, 238 S.W. 2d 93 (1951). Accordingly, the inclusion in Section 2(13) of employer contributions to fringe benefit funds is consistent with both Congress' flexible definition of "wages" and the judicial mandates that the Act be liberally construed to effect its remedial purpose.

Finally, it is important to note that the Benefits Review Board has chosen to follow the *Hilyer* decision in subsequent cases raising this same issue. *Minick v. Levin Metals Corp.*, _____BRBS_____, BRB No. 80-835 (April 28, 1982). This is significant because the Board does not always accept the court of appeals' interpretations of the Act. For example, the Board explicitly declined to follow the interpretation of Section 20(a) of the Act, 33 U.S.C. § 920(a), promulgated by the lower court in *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd sub nom., U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, United States Department of Labor*, 452 U.S. 913 (1982). *Jones v. J.F. Shea Co.*, 14 BRBS 207, BRB No. 79-548 (June 16, 1981). Thus, the Board's reversal of its longstanding position in favor of the *Hilyer* decision evidences the Board's affirmance of the soundness of the lower court's decision.

CONCLUSION

In view of the *Hilyer* decision's minimal effects on the administration of compensation claims and its proper interpretation of the LHWCA's definition of "wages", and the fact that the decision raises no important or novel question of federal law, the Metropolitan Washington Council, AFL-CIO respectfully urges this court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to Rule 42(3) of the Supreme Court Rules, the National Associaiton of Stevedores respectfully moves

for leave to file the attached brief as *Amicus Curiae* in support of the petitioner. Counsel for the petitioners have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STEVEDORES

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 68 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the states of Hawaii, Alaska and the Commonwealth of Puerto Rico. Based upon U.S. government manhour statistics it is conservatively estimated that NAS member companies are responsible for over 75 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor entitled to compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act, (the "LHWCA"), 33 USC § 901 *et seq.* The NAS members companies are directly responsible for workers' compensation payments under both federal and state law

either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interest of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and the amount of such benefits, has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Court of Appeals and in this Court in *Northeast Marine Terminal Corp.* v. *Caputo et al.*, 432 U.S. 249 (1977), *Edmonds* v. *Compagnie Generale Teansatlantic*, 443 U.S. 256 (1978), and *P. C. Pfeiffer Co., Inc.* v. *Ford*, 444 US 69 (1979).

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured longshoremen. *Amicus curiae* does not believe that the parties have considered the issue before this Court in precisely the same manner.

Amicus curiae therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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MORRISON-KNUDSEN CONSTRUCTION COMPANY,

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BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE STATUTE INVOLVED

This case involves the proper construction of sections 2(13) and 9(e) of the Longshoreman's and Harbor Workers' Compensation Act, 33 USC §§ 902(13) and 909(e), which provide as follows:

> SEC. 2. (13) "Wages" means the money rate at which the service rendered is recompensed

under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

SEC. 9. (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

THE QUESTION PRESENTED

The question presented to this Court, simply stated, is whether employer contributions made to union pension and/or welfare funds pursuant to collective bargaining agreements are "wages" within the meaning of section 2(13).

ARGUMENT

A. The Decision Below Is Clearly Wrong

For the reason so cogently stated by petitioners, the National Association of Stevedores believes that the decision of the United States Court of Appeals for the District of Columbia in *Hilyer* v. *Morrison-Knudsen et al* dated Dec. 1, 1980, (Nos. 80-1388, 80-1440, and 80-1504) from which certiorari is sought is plainly wrong and interjects into the statutory scheme enacted by Congress in 1928, and not changed since then, items which the Congress never intended to be included in the term "wages". Had Congress intended to include fringe benefit payments made pursuant to collective bargaining agreements in the computation of "wages" or "average weekly wage", Congress would have done so. It did not do so in 1928, and it did not do so in 1972 when it

made massive changes to the Longshoremen's and Harbor Workers' Compensation Act by enacting Public Law 92-576, 86 Stat. 1251 *et seq.*

The court below has in effect made legislative amendments to the Act which the Congress has not, and never intended, and for that reason the petition for writ of certiorari should be granted and the decision of the Court below reversed.

B. The Devastating Impact of the Decision Below

As petitioners state on page 6 of the Petition for Writ of Certiorari this case does appear at first blush to be an ordinary and narrow one of statutory construction. However, it is not. Petitioners' fears that unless the decision is promptly reversed it will have extraordinary and far-reaching consequences have been realized. Although the decision below was seemingly restricted to a single claim under the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.*, it now reaches all claims under the Longshoremen's and Harbor Workers' Compensation Act, as the District of Columbia Act is only an extension of the former. Thus, shortly after the decision of the Court below, member companies of the National Association of Stevedores were presented with claims under the Longshoremen's and Harbor Workers' Compensation Act which sought for the first time since 1928 the inclusion of the *Hilyer* fringe benefits in the calculation of average weekly wage.

Attempts by employers to confine the *Hilyer* decision to the District of Columbia were short lived. On April 28, 1982, the Benefits Review Board, which pursuant to sec. 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC § 921, hears all appeals on claims made under that Act, reversed its long standing position because of the decision below, and for the first time held that fringe benefits were "wages", *Lloyd E. Minick* v. *Levin Mitals Corp.*, BRB No. 80-835. The

Hilyer plague has now spread nationwide and must be considered in each of the more than 200,000 Longshore Act claims filed annually.

The financial impact on employers is devastating and almost beyond comprehension. A recent survey conducted by the National Association of Stevedores indicates that for the industry it represents fringe benefits under the several applicable collective bargaining agreements vary from *40 to 70 percent of direct hourly wages.* In one range of ports, the hourly fringe *benefits* (the plural is emphasized) are $4.95 on an average straight time's hourly wage of $12.40, or 40%. In addition, the decision below does not specify which employer contributions are to be included. Is it all? Is it only some, and if so, which ones? Not all collective bargaining agreements are the same. Another unresolved problem is the taxability of fringe benefits if they are to be included as "wages". Must employers now withhold and report the fringe benefit payments to the Internal Revenue Service?

Finally, the decision below raises the question of what is the "national average weekly wage" to be calculated annually by the Secretary of Labor pursuant to sec. 10(f) of the Act, 33 USC § 910(f) and sec. 6(b)(3), 33 USC § 906(b)(3)? Since the maximum benefits payable under the Act are 200 percent of the national average weekly wage it must be assumed that if *Hilyer* remains the law the Secretary of Labor must increase his computation of the national average weekly wages by about 30 percent, which, by operation of sec. 6 increases the maximum benefit level by 60 percent.[1] No industry, and no single employer, can survive such a massive increase in workers' compensation costs, even if one assumes the Secretary of Labor is able to place a dollar value on the fringe benefits of every collective bargaining agreement in the United States.

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[1] The present maximum benefit level under the Act is $497.24 per week.

CONCLUSION

For the reasons stated the National Association of Stevedores urges this Court to promptly grant the Petition for Writ of Certiorari and reverse the decision of the Court below.

Respectfully submitted,

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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether, despite the plain language and the legislative history of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") and fifty-four years of consistent administrative interpretation by the Department of Labor that has never been disturbed by Congress, the Court of Appeals was correct in concluding, for the first time by any federal court, that employer payments into union trust funds are part of an employee's "average weekly wage" under the Act.

2. Whether the true purpose of calculating a worker's wage, at the time of death, for purposes of the LHWCA, is to restore a portion of what his or her surviving spouse has actually lost by reason of the death, rather than, as the Court of Appeals held, everything of "value" that can be identified and thus included in the worker's wage, even though the surviving spouse will never qualify for the thing of value.

3. Whether the decision of the Court of Appeals should be allowed to stand when it will result in new and endless litigation contesting which trust fund contributions should now be considered part of an employee's "average weekly wage" under workers' compensation statutes, and how much each of these interests is worth under the particular facts of each case, despite this Court's ruling that one of Congress' principal legislative purposes was to ensure "prompt and certain recovery" of a "limited and determinate" amount.

LIST OF PARTIES *

The parties in case No. 80-1388 before the Court of Appeals were Sonia Hilyer, the widow of James H. Hilyer, as petitioner, and Morrison-Knudsen Construction Company ("Morrison-Knudsen") and Argonaut Insurance Company ("Argonaut") as respondents. The parties in case No. 80-1440 were Morrison-Knudsen and Argonaut as petitioners and Mrs. Hilyer as the respondent. The parties in case No. 80-1504 were the Director of the Office of Workers' Compensation of the United States Department of Labor as the petitioner and Morrison-Knudsen and Argonaut as respondents.

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* Petitioner, Morrison-Knudsen Construction Company, reports, pursuant to Rule 28.1 of the Rules of this Court, that Morrison-Knudsen Company, Inc. is the parent company with subsidiary companies which are all wholly-owned. Affiliate companies not wholly-owned include: Accurate Manufacturing Company, Internacional de Engenharia S. A. (IESA), Moore Financial Group, Inc., George E. Madding Company, Inc., and Westmoreland Resources, Inc.

Argonaut Insurance Company is a wholly-owned subsidiary of Teledyne Financial Corporation, which is a wholly-owned subsidiary of Teledyne, Inc. The following is a list of companies which are not wholly-owned subsidiaries of Teledyne, Inc., or its subsidiaries, but which may be deemed to be affiliates: Brockway Glass Company, Curtiss-Wright Corporation, Litton Industries, Inc., Riechhold Chemical Company, Teledyne Canada Limited, and Unicoa Corporation.

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IN THE

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No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Hilyer* v. *Morrison-Knudsen Construction Co.*, 216 U.S. App. D.C. 50, 670 F.2d 208 (1981), and appears as Appendix C to the Petition ("Pet. App.").[1] The orders of the Court

[1] We use the following abbreviations to refer to the materials in this case: "Pet. App." (Appendix to Petition for Writ of Certiorari); "Pet. Reply" (Petitioners' Reply to Respondent Hilyer's Opposition to Petition); "Pet. Supp. Memo." (Petitioners' Supplemental Memorandum); "JA" (Joint Appendix filed in conjunction with briefs on the merits); "Fed. Br." (Brief for the Federal Re-

of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc, dated January 14, 1982, are not reported, but appear at Pet. App. A and B.

The original decision and order of the Administrative Law Judge (No. 76-DCWC-158) issued September 7, 1976, is not reported, but appears as Pet. App. H (Pet. App. 36a). The order of the Benefits Review Board (Nos. 76-410, 410A) dated November 30, 1977, is reported at 6 B.R.B.S. 754, and appears as Pet. App. G (Pet. App. 28a). The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (Nos. 77-2076, 78-1087), dismissing the petition for lack of jurisdiction, filed July 19, 1978, is not reported, but appears as Pet. App. F (Pet. App. 27a).

The decision and order on remand of the Administrative Law Judge (No. 76-DCWC-158) dated October 5, 1978, is not reported, but appears as Pet. App. E (Pet. App. 23a). The order of the Benefits Review Board (No. 78-568), dated March 19, 1980, reviewed by the Court of Appeals in this case, is reported at 12 B.R.B.S. 87, and appears as Pet. App. D (Pet. App. 17a).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). The decision of the Court of Appeals in these

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spondent in Response to Petition for a Writ of Certiorari); "Hilyer Br. in Opp." (Brief for Respondent Hilyer in Opposition to Petition for a Writ of Certiorari); "Alliance Br." (Brief for Amici Curiae Alliance of American Insurers & Nat'l Assoc. of Indep. Insurers in Support of Petition for a Writ of Certiorari); "AIA Br." (Brief for Amici Curiae American Ins. Assoc. in Support of Petition for a Writ of Certiorari); "AFL-CIO Br." (Brief for Amicus Curiae Metropolitan Washington Council, AFL-CIO, in Opposition to Petition for a Writ of Certiorari); "Steve. Br." (Brief on the Merits for Amicus Curiae National Assoc. of Stevedores); "Ship. Br." (Brief on the Merits for Amicus Curiae Shipbuilders Council of Am.); "PX" (Plaintiff's Exhibit introduced at the July 1, 1976, hearing before the Administrative Law Judge); "Tr." (Transcript of July 1, 1976, hearing before the Administrative Law Judge).

cases was rendered on December 1, 1981 (Pet. App. 4a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on December 15, 1981, and denied on January 14, 1982 (Pet. App. 1a, 3a). The Petition for a Writ of Certiorari was filed on April 13, 1982, and was granted on October 4, 1982.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at Pet. App. I (Pet. App. 50a *et seq.*).

STATEMENT OF THE CASE

These are three cases—all involving the same claimant and the same legal issues—which were consolidated on appeal in the United States Court of Appeals for the District of Columbia Circuit. All three cases arose from the death of James H. Hilyer during the course of his employment with petitioner Morrison-Knudsen Construction Company ("Morrison-Knudsen"). At the time of his death, Hilyer was covered by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501, 502 (1973), which in turn incorporated the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1976) ("LHWCA") (Pet. App. 50a).[2] Under Section 9(e) of the LHWCA (Pet. App. 52a), death benefits are computed by reference to the "average weekly wage" of the deceased employee on an annualized basis.[3]

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[2] Although a new District of Columbia statute went into effect on July 26, 1982, it contains the same definition of "wages" interpreted by the court below. 36 D.C. Code § 301(19) (1981). Moreover, the definition espoused by the Court of Appeals was of the LHWCA, which of course has wider application than in the District alone.

[3] However, since Hilyer had been working for Morrison-Knudsen for only five months prior to his death, the Administrative Law Judge, pursuant to Section 10(b) and (d) of the Act (Pet. App. 53a-54a), correctly determined Hilyer's average weekly wage by reference to the average *yearly* wages of a fellow employee whose compensation could most closely be compared to that of Hilyer.

At the time of his death, Hilyer had been a member of Local 456 of the Laborers' District Council of Washington, D.C., and Vicinity—an affiliate of the AFL-CIO. The collective bargaining agreement between that union and Hilyer's employer required the employer to make certain payments to three union trust funds for each hour worked by each employee—namely, 28 cents into a health and welfare fund, 35 cents into a pension fund, and 5 cents into a training fund. PX 3 (JA 38-40).

Trust fund agreements for both the health and welfare and pension funds set out the basic requirements for receiving benefits and the schedule of payment for such benefits. Most of these benefits are awarded in situations *not* involving a job-related death or injury. PX 3 (JA 37-40); PX 7 (JA 44, 49-56, 60-68, 70-73). However, where benefits are paid which do relate to a job-related death or injury, the agreements do not require those benefits to be offset by any workers' compensation benefits. Furthermore, the trust agreements authorize the Board of Trustees alone to administer the trust funds (PX 7 (JA 59-60)), and at no time have employees had any voice in that administration. Tr. 60-61 (JA 32-33). The training fund was created for the purpose of training persons to perform the work covered by the collective bargaining agreement. PX 3 (JA at 40).

Hilyer's widow, respondent Mrs. Hilyer, argued before the Administrative Law Judge that the payments to the union trust funds should be included in her husband's "average weekly wages" for the purpose of calculating the death benefits to be paid to her by Morrison-Knudsen. Following an unbroken tradition since the LHWCA's adoption in 1927, the Administrative Law Judge rejected her contention (Pet. App. 36a), and the Benefits Review Board upheld his ruling (Pet. App. 28a).[4] In rejecting

[4] The case was remanded for a reconsideration of attorneys' fees. A new opinion was rendered dealing with this issue (Pet. App. E), which was reviewed and modified by the Benefits Review Board

Mrs. Hilyer's claim, the Board noted consistent Board authority holding that contributions by an employer to a health and welfare fund and a pension fund are not includable in wages, and found, moreover, that the record did not reflect whether Mr. Hilyer's rights in the funds had even vested.[5]

The Court of Appeals thereafter reversed the Board and held, for the first time by any federal court, that because the payments to the union funds were "readily identifiable and calculable" and were of substantial economic benefit to the employee, the payments were part of Hilyer's "average weekly wage" (Pet. App. 4a). In so ruling, the court purported to interpret "wages," which is defined as follows in Section 2(13) of the LHWCA, 33 U.S.C. § 902(13):

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(Pet. App. D). Although that issue was addressed by the Court of Appeals (Pet. App. 14a-16a), it is not before this Court for review.

[5] The Board observed that "inclusion of the contributions to the pension fund reflects a belief that the employee would also continue to work for employer and build up his pension" (Pet. App. 32a), that the health and welfare fund was "contingent on an illness occurring" (*id.*), and that the actual value of the health and welfare program was "dependent on their [the family's] possible use of it" (Pet. App. 33a). The Board further noted that amounts contributed by the employer would "in all likelihood not buy decedent's family similar kinds of protection" (*id.*), and that the value of the training program was "highly speculative" (*id.*). The Board concluded:

> Therefore, it is clear that in this case that an employee's right to these funds and the actual value of them to the injured employee is highly speculative. [*Id.*]

According to the court, "Congress chose to carry out [the] design [of the LHWCA] by including in the compensation formula *all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of the injury." Pet. App. 13a (emphasis in original).

SUMMARY OF ARGUMENT

Each of the standard guides for statutory construction—the plain language of the text, the underlying purpose of the statutory provision, the legislative history of the act, the authoritative interpretation by the enforcing agency, and the practical consequences of the construction—demonstrates that union fund contributions, like those sought by respondent, form no part of the "wages" payable under the LHWCA.

Union fund contributions, like pensions or disability benefits, are nowhere mentioned in the statutory definition of "wages." The plain language of that definition demonstrates that Congress intended to limit that term to items which are paid directly to the worker and which are related to the preinjury standard of living of the worker or his family. This limitation is confirmed by the Court's construction of "wages" in similar statutes. Moreover, in those instances when Congress has intended to include union fund contributions in "wages," it has explicitly provided therefor in the statute.

The basic purpose of the "wage" calculation is to restore a portion of what the worker's spouse has in fact lost by reason of the worker's death, in terms of what the family was accustomed to rely on to maintain its standard of living. In light of this purpose, the spouse has lost nothing by the failure of the union fund contributions represented by the trust funds.

The legislative history of the LHWCA demonstrates that Congress did not intend that employer contributions to labor trust funds be part of "wages" payable under the

Act. The Act was adopted solely to offer longshoremen the same benefits then available to other employees under state workers' compensation programs. Under this Court's decisions, Congress is deemed to have intended that statutory words should have the meaning authoritatively attributed to them at the time the LHWCA was passed. The term "wages" never at that time, nor at the time of any of the four benefit-altering amendments to the Act, included employer contributions to trust funds, either in the New York act from which the LHWCA was copied, or in any other compensation act. In 1972 a massive overhaul of the Act was undertaken, with a dramatic increase in benefit levels, but the definition of "wages" was not changed. Since the final benefit levels were the result of a fine balancing of interests, Congress could not also have contemplated an implied amendment of "wages" that might increase benefits 30 to 60 percent.

The Department of Labor, the federal agency charged with the administration of the LHWCA, has consistently construed the definition of "wages" to exclude an employer's trust fund contributions. This long-standing construction of the Act by its enforcing agency is entitled to considerable weight before this Court.

Relying on the Department's construction of the Act, the affected employers and insurers have consistently ordered their affairs without taking these employee benefits into consideration when setting insurance premiums or allocating reserves. Moreover, the disastrous consequences of including these benefits as part of "wages" demonstrate that Congress could not have intended to inflict such massive and unexpected costs upon the struggling longshoring and shipping industries. Even more importantly, the practical effect of the interpretation below will be the subversion of every purpose Congress intended the LHWCA to serve: whereas Congress intended benefits under the LHWCA to be fixed and limited, the decision below will render them indeterminate and virtually unlimited; whereas Congress intended the award-

ing of benefits to be swift and certain, the decision below will engender such dispute and litigation over compensable "values" that awards will no longer be timely paid; and whereas Congress intended through the LHWCA to replace the common-law tort system of recompense, the decision below will in effect revive that system.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE DEMONSTRATES THAT CONGRESS DID NOT INTEND TRUST FUND CONTRIBUTIONS TO BE INCLUDED IN "WAGES."

A. The Key Features Of The Term "Wages."

The plain language of the LHWCA demonstrates that trust fund contributions such as those here at issue are not included in wages. "Wages," as used throughout the Act, are defined as "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury * * *." 33 U.S.C. § 902 (13). The money rate is to include "the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer." *Id.* This definition of "wages" has remained unchanged since the Act was passed in 1927.

The special payments listed in the Act—board, rent, housing, lodging and gratuities—have two key features in common. They are paid directly and unconditionally to the employee, and they have a clear and present cash value. The same is true of other payments which, by a broad extension of the statutory language, have been recognized as coming within the phrase, "similar advantage"—namely, transportation, overtime and vacation pay.[6] By contrast, payments into a union trust fund are

[6] *See* 4 A. Larson, *The Law of Workmen's Compensation* § 60.12 (a), (b), pp. 10-564 to 10-573, and cases there cited (1978) (hereafter cited as *Larson*). *Cf. Harris* v. *Lambros*, 56 F.2d 488 (D.C. Cir. 1932).

not paid to the worker, nor can the worker at any time demand their value in cash. Here, for example, the record shows that Hilyer had no right to tell his union how to use the funds (Tr. 60-61 (JA 32-33)), and there is no evidence that before his death he even had a vested interest in them. Under the maxim *noscitur a sociis*,[7] the phrase "or similar advantage" should relate to benefits that similarly are provided directly to the worker and have a present cash value.

B. The Meaning Of "Wages" Must Be Consistent Within The Act.

The term "wages" is involved at two principal points in the determination of final benefits. The first step is that of calculating the particular worker's individual wage. But there is a second step, that of setting the overall benefit ceiling, in which the word "wage" is also crucial. The Act sets an absolute ceiling on benefits calculated as a percentage of "national average weekly wage."

The Act requires the Secretary of Labor to determine the national average weekly wage each year. 33 U.S.C. § 906(b)(3). If the worker is disabled, his maximum benefits cannot exceed 200% of the national average weekly wage. 33 U.S.C. § 906(b)(1)(D). Section 10 prescribes how the worker's "average weekly wage" is to be computed. 33 U.S.C. § 910. "National average weekly wage" is specifically defined to reflect the worker's national average weekly "*earnings*." Clearly, the term "earnings" does not connote sums that the worker does not and may never receive, and over which he has no

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[7] *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Equally applicable is the doctrine of *ejusdem generis*. *See United States* v. *Turkette*, 452 U.S. 576, 581 (1981).

Note that in this brief the term "fringe benefits" is generally avoided. The reason is that it is such a loose term that it can include some items like vacation pay, with definite cash value, that may be includable in the term "wages." Since trust fund contributions have no comparable cash value, it is more accurate to refer to them as precisely what they are, "trust fund contributions."

control. Moreover, "wage," "wages," "earnings" and "salary" are used interchangeably in the various subsections of Section 10. 33 U.S.C. § 910(a)-(f).

It would make little sense if "wage" or "wages" were to have one meaning in some sections of the Act and another in others. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). This is particularly true where each worker's "average wages" and the "national average weekly wage" as determined by the Secretary are intertwined and interdependent within the same sections of the Act.

C. This Court's Construction Of "Wages" In Analogous Contexts Confirms This Result.

Not only does the plain meaning of "wages" as defined in the LHWCA demonstrate that fund contributions are excluded, but this Court's construction of that term in analogous contexts confirms that meaning. *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), is a case in point.[8] It was argued, in part, that unions bargained for fund contributions as though they were wages, and that industry considered them as an integral part of the wage package. The Court's answer was succinct:

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[8] The Court was dealing with the Bankruptcy Act, which awarded priority to "wages * * * due to workmen." 11 U.S.C. § 104(a)(2). The issue was whether contributions by an employer to a union welfare fund, required by a collective bargaining agreement, qualified as "wages." The argument, as here, was that since such contributions were paid on behalf of, and for the benefit of, the employee, it was irrelevant who paid them or to whom they were paid. The Court disagreed.

The Court also distinguished *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957), which dealt with the requirement in the Miller Act, 40 U.S.C. §§ 270a-270d, that a contractor take out a payment bond "for the sum or sums justly due" each employee. The Court allowed recovery on the bond for delinquent contributions to a health and welfare fund. However, as pointed out in *Embassy Restaurant*, the opinion did not hold that such contributions were part of wages. 359 U.S. at 34-35. On the contrary, the Court in *Carter* specifically held that the Act did not "limit recovery on the statutory bond to 'wages'." 353 U.S. at 217.

"* * * we deal with a statute, not business practice." *Id.* at 33. Therefore, the Court concluded that the contributions were not "wages."

Among the Court's considerations were these: title to the funds was in the trustees; Congress had not specifically included such contributions, although it had amended the Bankruptcy Act on several occasions; the Act was intended to secure with some promptness for bankrupt employees the money directly due to them in back wages; and it was "evident that not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to employment." 359 U.S. at 31-32.[9] The same considerations apply to the LHWCA and to this case.

It can hardly be argued that the "wages * * * due to workmen" in *Embassy Restaurant* are different from "wages" in the instant case, as if the "wages" here are not due to workmen. This is particularly true where, as noted above, wages, earnings and salary are intermixed in the LHWCA. While it is certainly true that the same term may have different meanings in different statutes, it would be highly unlikely that the same term would have such widely diverse meanings as proposed here, with wages in one instance encompassing only direct payments to employees and wages in another incorporating all different types of payments to union trust funds by the employer.[10]

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[9] These are further reasons why the court below was in error in basing its decision partly upon the *Carter* case. Pet. App. at 11a-12a.

[10] One of the payments here was into a pension fund. In this regard, while *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), dealt with a different subject (the Military Selective Service Act), some of its reasoning is instructive. At issue was whether an employee was to receive credit under his employer's pension plan for the period he spent in military service. The focus of the controversy was over whether the benefits under the plan were awarded for services rendered (and were thus akin to wages), in which case

D. Congress Knows How To Include These Benefits Explicitly When It Wishes To Do So.

It is significant that when Congress has intended fund contributions of this type to be included within the "wages" referred to in a statute, Congress has clearly manifested that intent in the plain language of the statute itself. For instance, in 1964 Congress amended the Davis-Bacon Act of 1931, ch. 411, 46 Stat. 1494 (codified at 40 U.S.C. § 276 *et seq.* (1976)), specifically to include such interests.[11] The same is true of the Bankruptcy Act

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they would not be an aspect of seniority covered by the Act, or whether they were in the nature of a reward for length of service, in which case they would be protected. The Court held that they were protected because they were not awarded for services rendered.

If a pension is a reward for length of service instead of compensation for the service itself, it is difficult to understand why employer payments into a union fund for the express purpose of ultimately providing the worker with a pension can be considered "wages" under the LHWCA.

[11] As amended, Section 276a now reads in part:

> (b) As used in Sections 276a to 276a-5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages," and "prevailing wages" shall include—
>
> (1) the basic hourly rate of pay; and
>
> (2) the amount of—
>
> (A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and
> (B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying

of 1978, Pub. L. No. 95-598, 92 Stat. 2583, which also explicitly includes employee trust funds as part of the "wages" referred to in the Act.[12] These statutes demonstrate that Congress is well aware of benefits such as those presented in this case, and uses language specifically referring to those benefits when it intends for them to be included within the "wages" defined elsewhere in an act. Coupled with the everyday meaning of the term "wages," Congress' failure specifically to include such benefits within the language of Section 2(13) of the LHWCA manifests Congress' intent to exclude them.

E. Liberal Construction Does Not Mean Disregarding The Act's Plain Meaning.

The court below relied in part on the concept that the LHWCA must be liberally construed in conformance with its humanitarian and compensatory purpose. Pet. App.

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costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits: * * * *

[12] (a) The following expenses and claims have priority in the following order:

* * * *

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay * * *

(4) Fourth, allowed unsecured plans for contributions to employee benefit plans * * *.

Furthermore, Congress has adopted several statutes focusing directly upon the regulation of fringe benefit programs. For instance, in 1958 Congress adopted the Welfare and Pension Plan Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (codified at 29 U.S.C. § 302 *et seq.* (1976)) (superseded) in order to protect employee-pension plans. More recently, Congress has adopted the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 832 (codified at 29 U.S.C. § 1001 *et seq.* (1976)) and the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified at scattered sections of 29, 26, & 5 U.S.C.) to augment the protection afforded by the 1958 Act.

13a. As a general proposition, we agree with the concept. But it has no application here. Liberal construction has never meant that the courts must disregard plain statutory language or insert language which Congress has left out. *Director* v. *Rasmussen*, 440 U.S. 29, 46-47 (1979).

For example, in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278-279 (1977), and *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271 (1979), the Court did not seek to restrict the remedial LHWCA but at the same time felt compelled to reject a theory "that nowhere appears in the Act, that was never mentioned by Congress in the legislative process, [and] that does not comport with Congress' intent * * *." And in *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268 (1980) ("*Pepco*"), the Court stated that the LHWCA must be liberally construed (449 U.S. at 281) but then went on to hold that such a construction does not warrant providing disabled employees with a complete remedy for their industrial injuries, since this is not what Congress intended. *Id.* at 281-282.[13]

Thus, even in interpreting the remedial LHWCA, this Court has adhered to the rule that " '[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive.' " *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 604 (1981) (insertions in the original). Where the meaning of the Act is plain, it "should be respected." *Id.* at 617.

II. THE DECISION BELOW DISREGARDS THE SPECIFIC PURPOSE OF THE CONCEPT OF "WAGE" IN A COMPENSATION ACT: RESTORATION OF A PORTION OF WHAT WAS RELIED ON FOR STANDARD OF LIVING, AND WAS ACTUALLY LOST.

The central fallacy in the opinion below is that it attempts to interpret "wages" in the abstract. It declares

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[13] *See also Voris* v. *Eikel*, 346 U.S. 328, 333 (1953), and *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U.S. 408, 414-15 (1932).

the sole issue to be whether the fund contributions are a "value" that is "readily identifiable and calculable." It then works those words over as if it were writing a dictionary instead of a working rule in a total system designed for a definite practical purpose. What the court should have done was to realize that the purpose of calculating the worker's wage before his death is to restore a portion of *what his or her spouse has in fact lost by reason of the death*, in terms of what the family was accustomed to rely on to maintain its standard of living. Unlike most other social insurance systems, that pay flat-rate benefits, the American system has always attempted to key the benefit to past wages. The reason is not some notion that there is a legal right to a precise mathematical counterpart to some preinjury "values," whether identifiable and calculable or not. The reason is that at the time of injury or death, the family was living at a certain level represented by average wage, and the cash income benefit should be figured as a percentage of the wage on which the family actually lived.

Obviously, some tangible non-cash payments must also be included, such as board and room, and this statute expressly includes them, since these are indeed part of the standard of living and are indeed lost by the death or injury. But as to trust fund contributions, the fallacy is that, first, they do not form a part of the standard of living, and, second and more importantly, they are not in any meaningful sense lost as the result of the death or injury.

To sharpen this point, postulate that the contribution in question is for group life insurance—a very common type of fringe benefit. The worker is killed. In terms specifically of that contingent interest, what has the surviving spouse lost? Nothing. To the contrary, he or she has gained the face value of the life insurance. The same analysis can be repeated for almost all such contributions. Cessation of payments into union pension funds means nothing, because the deceased will never qualify for a pension. Cessation of payments for training is equally

meaningless. If these contributions are "wages," then why not the employer's contribution to Social Security?—a move that would dramatically increase the wage basis. The answer, again, is that by the deceased's death the surviving spouse, far from losing a "value," gains the survivor's benefits of the system. Why not unemployment insurance premiums? Again, nothing is lost. To reduce the whole matter to absurdity, one need only adduce another common plan—supplementary workers' compensation. The death or injury of the worker here actually confers the benefit that the premium payments only anticipated. If one adds to the face value of the supplemental compensation the value also of the insurance premiums used to purchase that supplemental compensation, one ends with the most preposterous kind of double payment.

III. THE LEGISLATIVE HISTORY OF THE LHWCA DEMONSTRATES THAT CONGRESS DID NOT INTEND TRUST FUND CONTRIBUTIONS TO BE INCLUDED IN "WAGES."

A. The *Pepco* Principle Controls This Case.

What is here called the "*Pepco* principle" may be paraphrased as follows: When Congress takes over intact a provision from a state act and enacts it into federal law, and when a particular interpretation of that provision at that time clearly "dominated the field," Congress must be deemed to have intended that interpretation.

In *Pepco*, decided only two Terms ago, the issue was a familiar one: are scheduled benefits exclusive? This Court, citing 4 *Larson*, § 58.23, noted that originally the exclusivity rule "did dominate the field," but also that in recent years there has developed a strong trend in the opposite direction, so that the non-exclusivity rule might well now be considered dominant. At this point, the Court could perhaps have said, "And, therefore, under the principle of liberal interpretation, we shall join this strong modern trend." But that is not what the Court

said. Rather, it concluded that the view dominating the field at the time of the statute's enactment must have been the rule that Congress intended.[14]

To carry over the *Pepco* principle to the present case, it is only necessary to note the undisputed fact[15] that union fund contributions of this kind have never at any relevant time in any jurisdiction been considered part of "wages" in calculating compensation benefits.[16] The most

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[14] * * * The relevant language was enacted in 1927. It was patterned after a similar "scheduled benefits" provision in the New York Workmen's Compensation Law enacted in 1922. A few years after enactment of the LHWCA, the New York Court of Appeals was confronted with the same question of construction under the New York statute that is now presented to us under the federal statute. The New York Court of Appeals apparently considered the statutory language so clear on its face that little discussion of this issue was necessary * * *.

Nothing in the original legislative history of the Federal Act or in the legislative history of subsequent amendments indicates that Congress did not intend the plain language of the federal statute to receive the same construction as the substantially identical language of its New York ancestor. [*Id.* at 275-276; footnotes omitted.]

* * *

Our task is to ascertain the congressional intent underlying the schedule benefit provisions enacted in 1927; we are not free to incorporate into those provisions subsequent state-law developments that we may consider sound as a matter of policy. In attempting to ascertain the legislative intent underlying a statute enacted over 50 years ago, the view that once "dominate[d] the field" is more enlightening than a recent state-law trend that has not motivated subsequent Congresses to amend the federal statute. The once dominant view is entirely consistent with a literal reading of the Act. [*Id.* at 280; footnote omitted.]

[15] This fact is admitted, for example, in the brief below of the Metropolitan Washington Council, AFL-CIO, at p. 7: "In fact, *Hilyer* takes away from employers an unjustified benefit *they have long been receiving* at the expense of their employees" (emphasis supplied).

[16] It should also be mentioned that, in the instant case, there has not even been a "recent trend" toward the Court of Appeals interpretation, as there was in *Pepco*.

direct evidence of this for purposes of the Longshoremen's Act is the longstanding and consistent interpretation of the Act by the Secretary of Labor, detailed in Part IV below. As to the law in New York and other states, there is not a single reported case, either at the time of the Act's passage, or at time prior to the 1972 amendment, holding that union fund contributions are includable as part of "wages." Respondent Hilyer's brief below, at 11-13, extracts from this history the curious argument that no federal court has ever held that such benefits should *not* be included. The obvious explanation is that, until very recently, the practice of not including them was so well settled that it simply would never have occurred to claimants or claimants' lawyers even to ask for them.

Equally curious is the reaction to the *Pepco* principle by the Ninth Circuit in *Duncanson-Harrelson Co.* v. *Director*,[17] a decision which followed the decision below and which thus became only the second federal decision in over 50 years to include union fund payments in "wages." After noting the argument of the Labor Department that this Court's decision in *Pepco* "supports the view that we must interpret the term 'wages' according to the definition that was commonly accepted in 1927," the Ninth Circuit added, "We disagree." [18] The court said:

> * * * [T]he Director insists we must apply a narrow definition of wages which excludes fringe benefits because when Congress enacted the statute in 1927 it would not have considered such benefits to be part of an employee's wages. * * * Although the concept of wages may have changed since 1927, we do not find that Congress intended an inflexible meaning of "wages" in the definition provided by section 902(13). * * * [*Id.* at 15a; footnote omitted.]

The Ninth Circuit did not cite any legislative history during any period of time, before or after 1927, for the

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[17] Decided September 14, 1982, and reprinted in an Appendix to Pet. Supp. Memo.

[18] Pet. Supp. Memo. at 15a-16a n.7.

proposition that Congress intended such an all-embracing definition of "wages" or that it had changed its mind after 1927. The reason is clear; there is no such legislative history, as we now demonstrate.

B. The Legislative History Of The Original Enactment.

Introduced on the floor of the Senate on February 17, 1926, the bill—S. 3170 or the Cummins Bill—that ultimately became the LHWCA was a companion to an identical bill introduced into the House the following day, H.R. 9498 or the Graham Bill. Each bill contained in Section 2(f) a definition of "wages" almost identical to the version adopted in Section 2(13).[19] Each bill was promptly referred to Committee, where over 20 witnesses from labor, industry, and the federal government testified.

No one suggested that the term "wages" in either bill included, or should be amended to include, fringe benefits or contingent interests. Most supporters of the bills simply expressed their desire for a compensation program covering longshoremen and the need for federal legislation. *E.g., Senate Hearings on S. 3170* at 18-19, 20-23, 41-42. Only two witnesses in the Senate hearings, who

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[19] Section 2(f) read as follows:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

Compensation For Employees in Certain Maritime Employments: Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary, 69th Cong., 1st Sess. 1 (1926) (hereafter cited as *Senate Hearings on S. 3170*); *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearing on H.R. 9498 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 2 (1926).

As adopted, the statute substituted "injury" for "accident" to conform Section 2(13) to the definition of "injury" in Section 2(2).

opposed the bills, referred with any degree of specificity to the "wages" actually paid to longshoremen, and both used the term "wages" to refer to a longshoreman's take-home pay. *Senate Hearings on S. 3170* at 77, 80. No one challenged their interpretation or suggested that some other meaning was more appropriate. No one addressed the meaning of "wages" before the House Committee either. The only witnesses who referred to wages at all were concerned with the specific dollar amounts to be paid as "wages," not with the components of that term. *To Provide Compensation For Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearings on S. 3170 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 139-140, 143, 149, 156-157 (1926). Everyone present assumed that a longshoreman's "wages" referred to his pay.

The bill reported by the Senate Committee did not use the definition of "wages" contained in the original bill introduced by Senator Cummins.[20] Instead, the amended version of S. 3170 proposed by the Judiciary Committee incorporated the benefits schedule contained in the Federal Employees' Compensation Act of 1916.[21] Like the existing federal program, the Committee's proposal calculated compensation awards on the basis of a worker's "average monthly pay," which did not include trust benefits as a measure of compensation.[22] Because the legisla-

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[20] *Compare Senate Hearings on S. 3170* at 1 (giving definition of "wages" in Section 2(f) of S. 3170, as introduced), *with* S. Rep. No. 973, 69th Cong., 1st Sess. 1 (1926) (omitting "wages" from list of definitions of amended bill).

[21] S. Rep. No. 973, *supra*, at 2-3 (reprinting Section 7 of Committee proposal); *id.* at 3 (reprinting Section 9 of Committee proposal).

[22] The Committee explained that it had amended S. 3170 in this fashion, not to introduce any novel compensation features, but because the adoption of the federal employees' compensation schedule "would be more equitable" for two reasons: "first, because the Federal commission is familiar with the administration of this law and there would be greater certainty of findings and decisions,"

tive history of the 1916 Federal Employees' Compensation Act contains no hint of the proposition that trust benefits were to be included in the compensation award,[23] it is clear that the Senate Judiciary Committee did not intend the LHWCA to include such benefits. Without debate, the Senate passed the bill, and sent it to the House.

The House Committee reported an amended version of S. 3170 that contained the definition of "wages" given in both of the original bills, as well as the original compensation schedule.[24] The Committee did not specify why it had substituted the definition of "wages" and the compensation schedule found in the original bills for the federal employees' compensation schedule adopted by the Senate. Presumably, the Committee did so because it continued to hold the view, as expressed in its Report on H.R. 9498, that the New York law, after which H.R. 9498 was patterned, was "one of the best."[25] In any event, the House Committee did not reject the Senate bill in order to adopt any compensation features unknown at that time. The House Report declared that the Committee's bill was designed to offer longshoremen "the same remedies" otherwise available under state law. H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20 (1927).

The House Committee's version met with approval in both chambers. Discussion in the House was brief, and the House passed the Committee bill without amending

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and "second, because Congress is fairly familiar with the workings of the present Federal law and the passage of this much needed act would be facilitated." S. Rep. No. 973, *supra*, at 17.

[23] *See* H.R. Rep. No. 678, 64th Cong., 1st Sess. (1916); S. Rep. No. 733, 64th Cong., 1st Sess. (1916); H.R. Conf. Rep. No. 1195, 64th Cong., 1st Sess. (1916).

[24] H.R. Rep. No. 1767, 69th Cong., 2d Sess. 2 (1927) (proposed Section 2: definition of "wages"); *id.* at 4-5 (proposed Section 8: disability benefits); *id.* at 5-7 (proposed Section 9: death benefits).

[25] H.R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926).

Section 2(13). No one questioned the meaning of the "wages" that were to serve as the basis for compensation.[26] The Senate accepted the House version of the LHWCA without any debate over the different compensation schedule, and passed the House bill the same day it was introduced. 68 Cong. Rec. 5909 (1927).

Respondent's position, and the decision of the Court of Appeals, that an employer's trust fund contributions are part of the "wages" recompensed under the Act finds no support in the legislative history. If the Congress that passed the Act understood "wages" to include such contributions—and it is the opinion of *that* Congress that counts, *Pepco*, *supra*, 449 U.S. at 280—then it is odd that nowhere in the legislative history is it even mentioned that longshoremen were to receive such benefits, their amount, how they were paid, and how they were to be calculated into the "wages" they were to receive. The text of the Act itself mentions several forms of remuneration other than straight pay, such as room and board. Union fund contributions, such as employer payments to pension plans, are nowhere mentioned in the text or legislative history because they were nowhere in existence, and because payment of these benefits would have subverted the purpose of limited compensation.

C. The Legislative History Of The Pre-1972 Amendments.

Congress increased the benefits levels on three different occasions between 1927 and 1972—in 1948, 1956, and 1961—to take into account increases in the cost of living.[27] None of these amendments, however, modified the defini-

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[26] Only two Representatives even spoke to the compensation afforded by the bill. 68 Cong. Rec. 5412-13 (1927) (remarks of Rep. O'Connor); *id.* at 5413-14 (remarks of Rep. Boylan). Neither discussed the term "wages."

[27] Act of June 24, 1948, ch. 623, 62 Stat. 602, 603; Act of July 26, 1956, ch. 735, 70 Stat. 654; Act of July 14, 1961, Pub. L. No. 87-87, 75 Stat. 203; The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251.

tion of "wages" to be used in fixing the new benefits levels. In fact, the House Report on the 1961 Amendment, for instance, stated that the benefits increase was designed simply to *"bring the benefit structure into line with the original intent of the act."* H.R. Rep. No. 57, 87th Cong., 1st Sess. 1-2 (1961) (emphasis added).

Each modification was premised upon a wage level reflecting the pay increases longshoremen had received in the interim, without any mention of any trust benefits that were also to be included.[28] Moreover, Congress' concern with offsetting inflation-caused increases in the cost of living, such as "the greater cost of providing proper and adequate child care under present-day conditions,"[29] demonstrates that Congress intended to increase only the dollar amount of compensation, without adding trust benefits to that increase. In addition, Congress also noted that, even with the increased awards, compensation payments would still be less than the income a longshoreman earned while employed,[30] a fact inconsistent with an award of trust benefits not paid out while a longshoreman was working. Finally, and most importantly, no one ever asked Congress to amend the definition of "wages" given in Section 2(13) of the original Act to include trust benefits. Labor representatives simply asked Congress to increase the dollar amount of compensation paid out under the Act, not the components

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[28] (1) *The 1948 Amendments*: S. Rep. No. 1315, 80th Cong., 2d Sess. 3 (1948); H.R. Rep. No. 2095, 80th Cong., 2d Sess. 3 (1948).

(2) *The 1956 Amendments*: S. Rep. No. 853, 84th Cong., 1st Sess. 2 (1955); H.R. Rep. No. 2067, 84th Cong., 2d Sess. 2, 3-4 (1956).

(3) *The 1961 Amendments*: H.R. Rep. No. 57, *supra*, at 1-2; S. Rep. No. 481, 87th Cong., 1st Sess. 2-3 (1961).

[29] S. Rep. No. 1315, *supra*, at 5; H.R. Rep. No. 2095, *supra*, at 7 (quoting and adopting Senate Report recommendation).

[30] *See, e.g.*, S. Rep. No. 853, *supra*, at 2.

of the "wages" upon which that compensation was calculated.[31]

Therefore, it is plain that, in these amendments, Congress did not explicitly or implicitly award disabled longshoremen or their dependents fringe benefits or contingent interests not contained in the "wages" defined in the original LHWCA.

D. The Legislative History Of The 1972 Amendments.

By far the most significant legislative history bearing on the present issue is that accompanying the massive amendments to the Longshoremen's Act in 1972. There are two principal reasons for this. One is that, by 1972, this kind of employer contribution to union funds was a

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[31] (1) *The 1948 Amendments: Longshoremen's And Harbor Workers' Compensation Act Amendments: Hearings on S. 2237 and Related Bills Before a Subcomm. of the Senate Comm. on Labor and Public Welfare*, 80th Cong., 2d Sess. 25, 32, 38, 66 (1948); *Amendments to the Longshoremen's And Harbor Workers' Compensation Act: Hearings on H.R. 5653, H.R. 5739, H.R. 6048, & H.R. 6647 Before Subcomm. No. 6 of the House Comm. on Education and Labor*, 80th Cong., 2d Sess. 5, 17, 22, 34 (1948).

(2) *The 1956 Amendments: Longshoremen's And Harbor Workers' Compensation Act: Hearings on Bills Relating to the Longshoremen's And Harbor Workers' Compensation Act Before A Special Subcomm. of the House Comm. on Education and Labor*, 84th Cong., 2d Sess. 27, 31, 32, 34, 35, 46, 94 (1956); *Longshoremen's And Harbor Workers' Compensation: Hearings on S. 594, S. 1307, S. 1308, S. 1646, & S. 2280 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 84th Cong., 1st Sess. 34, 40, 80 (1955).

(3) *The 1961 Amendments: Amendments to Longshoremen's And Harbor Workers' Compensation Act: Hearings on H.R. 6111, H.R. 7496, H.R. 8600, H.R. 9317, H.R. 9552, H.R. 9748, H.R. 10075, & H.R. 11714 Before the Subcomm. on Safety and Compensation of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 34, 59, 87, 105 (1960); *Amendments to Longshoremen's And Harbor Workers' Compensation Act: Hearings on S. 733 & H.R. 1258 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 87th Cong., 1st Sess. 13, 14 (1961).

conspicuous and widespread feature of employment in general and longshore employment in particular—so much so that it is inconceivable that an element of this magnitude would have been completely overlooked in the finely-tuned balancing of interests underlying these amendments. The other reason is that all parties to these amendments were intensely interested in the precise feature of the Act that would be affected by any radical change in the concept of "wage"—that is, the exact value of the compensation benefit level. This was because at the heart of the 1972 compromise was a trade-off of *Sieracki-Ryan* damage recoveries by longshoremen for greatly increased compensation benefits. In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), this Court held that the virtual nonfault liability of a ship for unseaworthiness extended to longshoremen. This holding laid the groundwork for *Ryan Stevedoring Co.* v. *Pan-Altantic S.S. Corp.*, 350 U.S. 124 (1956), in which the Court held that a contract to perform stevedoring operations implied an agreement with the shipowner to perform these services in a workmanlike way, and a further agreement to indemnify the shipowner for any liabilities he might incur as result of failure to live up to this promise. *Id.* at 133-34. Ryan coincided with a marked expansion of the doctrine of unseaworthiness, extending it, for example, to conditions on dry land. *Thompson* v. *Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964). Indeed, this Court itself had expanded the concept to include assault by a fellow worker. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955).

Because the net result, in most cases, shifted the full burden of the ship's liability to stevedore employer, there was mounting complaint that the employer's supposed immunity had been destroyed. Moreover, because of the shift from workers' compensation benefits to *Sieracki-Ryan* damage recoveries, there was little pressure to in-

crease compensation benefits, and they remained locked for years at $70 a week. The 1972 amendments immediately raised this figure to $167, and by January 1, 1982, by operation of the new "indexing" feature, the figure had reached $496.70. The *quid pro quo* for this dramatic increase was the abolition of both the *Sieracki* and the *Ryan* doctrines.

For present purposes, the important point is that this *quid pro quo* was the result of a careful balancing of gains and losses with measurable dollar values. Can anyone imagine that Congress—or any of the parties—also intended a redefinition of "wage" that might well have increased the longshoreman's benefits and the employer's costs by, say, 40 percent? Suppose the matter had been brought out in the open, and the longshoremen had proposed a formal redefinition of "wage" to include union fund contributions. Obviously, there would have been elaborate calculations and discussions, both by the parties and by Congressmen, as to what the dollar value and cost of this change would be, and how it would affect the balancing of interests involved. The same would have been equally true if, without an overt amendment proposal, it had ever occurred to anyone that such a change in the meaning of "wage" had somehow taken place *sub silentio* over the years.

This is why it is so crucially significant that, despite testimony from dozens of interested parties, filling over one thousand pages of hearing transcripts, discussing every perceived flaw in the existing Act, *no one ever suggested that the "wages" payable under the Act did or ought to reflect an employer's pension or welfare fund contributions.* In every instance in which the discussion centered around the wages payable as compensation, witnesses either explicitly or implicitly used the term "wages" to refer to pay; moreover, there was no testimony concerning union fund contributions in the evidence presented to

the Senate and House Committees demonstrating the need for higher compensation awards.[32]

Labor representatives uniformly criticized the maximum and minimum compensation levels set by the 1961 amendments on the ground that they were unrealistically low in light of the inflation and wage increases that had taken effect since then. For instance, Howard McGuigan, Legislative Representative of the AFL-CIO, testified that the $70 per week maximum, based, as it was, upon a $105 average weekly wage, had become outdated the year after it was adopted.[33] Consequently, "the current maximum weekly benefit available to an injured worker and his family under the Longshoremen's Act is less than the Department of Labor designated poverty level of income for a nonfarm, four-member family." [34]

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[32] *Longshoremen's And Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, & S. 1547 Before a Subcomm. on Labor of the Senate Comm. on Labor and the Public Welfare*, 92d Cong., 2d Sess. 61-63, 66-67, 68, 78-81, 87-88, 98 (Table I), 99 (Table II), 101 (Table IV) (1972) (hereafter cited as *1972 Senate Hearings*) (testimony and written statement of Howard McGuigan, Legislative Representative, AFL-CIO); *id.* at 147-149 (statement of Everett Ede, Former President of Local 8, ILWU); *id.* at 171, 183 (statement of Ralph Hartman, Bethlehem Steel Corp.); *id.* at 617 (statement of Rep. Burton); *id.* at 640 (statement of Chester Eschen, Jr., President of California Stevedore & Ballast Co.); *id.* at 676 (statement of Everett Ede); *id.* at 690-94 (Table) (statement of Frank Bonadio, President of Building & Construction Trades Dep't, AFL-CIO); *Longshoremen's And Harbor Workers' Compensation Act: Hearings on H.R. 247, H.R. 3505, H.R. 12006, & H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 68-69 (1972) (hereafter cited as *1972 House Hearings*) (statement of Ralph Hartman); *id.* at 245 (statement of Frank Bonadio); *id.* at 256-58, 261, 266 (Table I), 267 (Tables II & IV), 282; *id.* at 295 (statement of Thomas Gleason, ILA, AFL-CIO); *id.* at 296-98 (statement of Joseph Leonard, Safety Director, ILA).

[33] *1972 Senate Hearings* at 61, 98 (Table I).

[34] *Id.* at 62. Everett Ede, former president of a local chapter of the ICA and active longshoreman himself, identified, quite

To remedy these shortcomings, labor representatives sought an increase in the dollar amount of compensation offered, in a variety of categories, as well as the elimination of benefit ceilings. Were Congress to enact these recommendations, they testified, the LHWCA would again be able to serve its purpose of preventing the pauperization of disabled longshoremen.[35] No one, however, asked Congress to alter the basis upon which compensation

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bluntly, the reason why the current compensation provisions were insufficient—compensation awards failed to approach preinjury take-home pay:

> When a longshoreman is injured—what happens? I don't mean what technical procedures are followed—I mean what happens psychologically to this worker and his family, even aside from the worries regarding his physical well-being? He, the workman, has been earning $190 to $210 a week bring-home money, and like most wage earners, lives from paycheck to paycheck. They have bills to pay, house payments, lights, phone, water, furniture, car, insurance, clothes, fuel, taxes, food, and children to educate. That "sure, swift, adequate compensation" isn't automatic. Reports are made, claims are filed, and in some weeks he could get a check—but not $190 a week—$70 a week, and they *almost* have enough to eat on. [*Id.* at 675, 676 (emphasis in original).]

[35] Joseph H. Koonz, Jr., former Chairman of the District of Columbia Bar Association's Subcommittee on Workmen's Compensation, explicitly portrayed the purpose of the proposed benefits increase in this light:

> In the District of Columbia in 1971, the average weekly wage of all insured employees was $152. * * * Since the average worker earns a minimum in excess of twice the weekly benefits now provided under the law, this worker, when injured, cannot and does not meet his financial commitments for housing, food, clothing, etc. on $70 a week. Consequently, he must turn to other sources for financial help. This means public assistance, welfare, charity, from whatever source is available to him. This depletes the funds that were not created for this purpose, thus depriving other needy citizens of these funds, and also destroys the injured worker's dignity, making him a partial ward of the community. This situation, which I have seen occur time after time in my practice, is one which would not exist if compensation benefits were adequate. [*1972 Senate Hearings* at 167.]

awards were to be calculated. The "wages" identified by labor representatives as being unreasonably low were, in each instance, the pay that longshoremen received, without counting any union fund contributions that might have been made. Indeed, their repeated pleas for some means of relieving disabled longshoremen or their dependents for relief from the poverty into which they had fallen can only be read as referring to their lost pay because it was, according to their testimony, the growth of take-home wages, not the expansion of union fund contributions that had outstripped compensation.

Responding to these pleas, Congress "raise[d] benefits to a level commensurate with present day *salaries* and with the needs of injured workers whose sole support will be payments under the Act." S. Rep. No. 1125, 92nd Cong., 2d Sess. 5 (1972) (emphasis added). *See* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972). Disability and survivor benefits had historically been set at 66⅔% of a longshoreman's average weekly wages in order to avoid overcompensating highly paid workers, and were also subject to a fixed dollar amount as the maximum award. *Id.* at 2. But, owing to wage increases, the maximum benefit award had become outdated and left most longshoremen with an award that failed to approach their employment pay. *Id.* at 1, 2; S. Rep. No. 1125, *supra*, at 4. Rather than simply once again fix a higher maximum amount, Congress eliminated any set figure in favor of permitting the maximum award to rise in accordance with twice the national average weekly wage calculated by the Secretary of Labor. By doing so, Congress hoped to ensure that virtually all longshoremen would receive ⅔ of their average weekly wage without the need for periodic congressional revisions. *See* H.R. Rep. No. 1441, *supra*, at 3; S. Rep. No. 1125, *supra*, at 5. The legislative history demonstrates that, through these amendments, Congress expected that longshoremen would consistently be able to obtain the same type of wage benefits that

Congress had anticipated when it first enacted the LHWCA.

By 1972, Congress was well aware of the existence of fund contributions, having amended the Davis-Bacon Act in 1964 specifically to include employer pension fund and other trust benefit contributions within the meaning of "wages" in that Act, originally passed in 1931. *See* S. Rep. No. 963, 88th Cong., 2d Sess. 1-2 (1964). No one suggested, however, that the LHWCA ought to be revised to take such contributions into account. "This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique, supra*, 443 U.S. at 266-267.

This silence was not an accidental oversight. Modifying the components of the "wages" upon which compensation was based was not only unrequested, it was unnecessary. By coupling the adjustment formula to the higher level of benefits, Congress was able to provide longshoremen with their sought-after benefits increase as well as ensure that the state of affairs existing in 1972 would not be repeated. At the same time, Congress was aware that it could provide this benefits increase without imposing any substantial additional costs upon shipowners or stevedores by eliminating the *Sieracki* and *Ryan Stevedoring* doctrines.[36] In other words, Congress was able to accommodate the interests of all parties in the manner it did without needing to alter the historically understood basis

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[36] Several persons stated that the elimination of the *Sieracki* and *Ryan Stevedoring* doctrines would permit Congress to increase the compensation awarded under the Act without leading to a substantial increase in insurance premiums. *See, e.g., 1972 Senate Hearings* at 720 (letter of June 2, 1972, from Braxton Carr, President of American Waterways Operators, Inc., to Sen. Williams); *1972 House Hearings* at 93-94 (statement of James Flynn, representing New York Shipping Assoc., Inc., and National Maritime Compensation Comm.).

upon which the new compensation awards would be calculated.

That Congress did not even consider revising the definition of "wages" in 1972 despite legislating a massive benefits increase—and that Congress had never considered revising Section 2(13) prior to the decision below[37]—is the capstone of an unbroken historical consensus that the definition of wages given in Section 2(13) of the original LHWCA and unaltered since its inception does not now and never has included fund contributions such as those at issue in this case.

IV. THE DEPARTMENT OF LABOR, THE AGENCY CHARGED WITH ADMINISTRATION OF THE LHWCA, HAS CONSISTENTLY TAKEN THE POSITION THAT TRUST FUND CONTRIBUTIONS ARE NOT WITHIN THE "WAGES" DEFINED IN THE ACT.

The Department of Labor has been interpreting the term "wages" in state and Federal workers' compensation statutes for over 70 years and, with the exception of its position before the District of Columbia Circuit,[38]

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[37] As we pointed out in our Reply Brief in support of the Petition (Pet. Reply at 3 n.1), the Senate has recently passed a bill—which, on this point, was unopposed by Amicus AFL-CIO or any other labor representative (*id.*)—that would effectively overrule the decision below. 128 Cong. Rec. S912 (daily ed. July 27, 1982) (reprinting amendment to Section 2(13) as adopted). However, this bill, even if enacted by the House, would not apply to this case. By its terms, the bill adopted by the Senate is applicable (with certain exceptions not relevant here) only to "an injury, disability, or death which occurs or commences on or after the date of enactment of this Act * * *." 128 Cong. Rec. S9216-17 (daily ed. July 27, 1982) (Section 25: effective date). Moreover, there is no indication when or whether this bill will come up for a vote in the House and be signed by the President.

[38] The only exception to this consistent, long-standing interpretation was the position taken by the Director of the Office of Workers' Compensation Programs before the District of Columbia Circuit in

the Department has never interpreted "wages" to include employer trust fund contributions. Significantly, the Department's construction was evident at the time Congress enacted the LHWCA. Several witnesses from the Department of Labor testified during the Congressional hearings on the LHWCA, and none suggested that the "wages" defined in Section 2(f) of the Cummins-Graham Bills included fringe benefits or contingent interests.[39]

Since the adoption of the LHWCA, the Secretary has never suggested that the LHWCA offered compensation for lost fund contributions. In fact, in 1968 the Associate Solicitor of the Department of Labor concluded that " 'it would be improper to assert the inclusion of pension and health plan contributions by the employer in computing wages * * *' "[40] because Congress never contemplated

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the litigation of this case, a position that the Department of Labor has now concluded was incorrect and has abandoned in this and all other cases involving this question. *See* Fed. Br. at 4 n.2. Accordingly, the administrative construction of the term "wages" carries with it not only the weight of a longstanding interpretation but also the benefit of a contemporary re-examination. *See Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

[39] *See Senate Hearings on S. 3170* at 40 (statement of L.B. Clark, U.S. Bureau of Labor Statistics); *id.* at 43 (statement of Bessie Breggeman, Chairman, United States Employees' Compensation Commission); *id.* at 44 (statement of Charles Verrill, Member, United States Employees' Compensation Commission).

[40] Bureau of Employees' Compensation, Wage and Labor Standards Administration, U.S. Department of Labor, *LS/HW Program Memorandum No. 32* (June 17, 1968) (reprinted at AIA Br. App. 1a) (quoting Associate Solicitor's Advisory Opinion of Mar. 18, 1968). To be sure, the Associate Solicitor did go on to state that there was "support for including such contributions in wages." But in so doing, the Associate Solicitor did not refer to legislative history of the original LHWCA or any of its amendments, but referred instead to *other* statutes (and interpretative decisions) some of which were enacted *after* the adoption of the LHWCA. *Id.* at 2a-4a (referring to National Labor Relations Act, amendments to the Davis-Bacon Act, the Bankruptcy Act, and the Fair Labor Standards Act). The Associate Solicitor's opinion, therefore, must be read to

that such contributions would be included.[41] Thus, the Department of Labor has construed the Act to mean that such contributions form no part of wages. It has also concluded that the Congressional intent under Section 2(13) was to exclude these contributions, and, quite properly, it considers itself bound by that intent.

The Department of Labor has continued to adhere to this interpretation since its 1968 opinion when carrying out its responsibilities under Section 5(b)(3) of the 1972 Amendments, 86 Stat. 1252 (codified at 33 U.S.C. § 906 (b)(3)), to calculate the "national average weekly wage." The Secretary has never included the type of union fund contributions identified as wages by the Court of Appeals in that calculation. In fact, the Longshore Procedure Manual of the Department of Labor, used to calculate "wages" and the appropriate benefits, explicitly excepts an employer's contributions to pension and health plans, in accordance with the 1968 interpretation of the Solicitor of Labor. Alliance Br. App. C.[42]

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conclude that nothing in the LHWCA or its legislative history by themselves support the construction of "wages" accepted by the Court of Appeals.

[41] As the Associate Solicitor concluded:

> In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. Since we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices. [*Id.* at 4a.]

[42] Moreover, the Benefits Review Board, the administrative body of the Department of Labor that hears appeals from the decision of the administrative law judge in all LHWCA cases, uniformly rejected attempts to include fund contributions within "wages" prior to the decision below. *See Collins* v. *Todd Shipyards Corp.*, 5 B.R.B.S. 334 (1977); *Lawson* v. *Atlantic & Gulf Grain Stevedores Co.*, 6 B.R.B.S. 770 (1977); *Hilyer* v. *Morrison-Knudsen Construction Co.*, 6 B.R.B.S. 754 (1977), *aff'd in part, rev'd in part, and*

This Court has held on numerous occasions that a reasonable interpretation of a statute by an agency charged with its administration is entitled to substantial deference. *E.g.*, *Schweiker* v. *Hogan*, 102 S. Ct. 2597, 2609 (1982); *United States* v. *Clark*, 102 S. Ct. 805, 811 (1982); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177, 189-190 (1981). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*FEC* v. *DSCC*"); *see Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). In this case, all of the factors to be considered when evaluating an agency's interpretation—"the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *see FEC* v. *DSCC*, *supra*, 454 U.S. at 37—apply here and weigh in favor of the interpretation proposed by petitioners and the Department of Labor.[43]

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remanded, 216 U.S. App. D.C. 50, 670 F.2d 208 (1981), *cert. granted*, No. 81-1891 (Oct. 4, 1982); *Freer* v. *Duncanson-Harrelson Co.*, 9 B.R.B.S. 888 (1979), *aff'd in part, rev'd in part, and remanded sub nom. Duncanson-Harrelson Co.* v. *Director*, 686 F.2d 1336 (9th Cir. 1982); *Waters & Levis* v. *Farmers Export Co.*, Nos. 79-329A & 79-330A (June 12, 1981), appeal pending Nos. 81-4258 & 81-4273 (5th Cir.), decision withheld pending action by this Court (June 9, 1982) (minute entry by Clerk of Court). *See also Barber* v. *Tri-State Terminals, Inc.*, 3 B.R.B.S. 244 (1976) (unemployment benefits). The Benefits Review Board came to the contrary conclusion in *Minick* v. *Levin Metals Corp.*, No. 80-835 B.R.B. (April 28, 1982), only by compulsion of the decision below, but the Board has granted a motion for reconsideration in that case.

[43] The Department of Labor is also not the only federal agency to conclude that "wages" do not include union fund contributions. The Comptroller General and the General Accounting Office also hold

Thus, the consistent and longstanding interpretation of "wages" reached by the Department of Labor is fully consistent with the plain meaning of the LHWCA and its legislative history, and, as discussed below, has generated substantial, legitimate reliance by the private sector. That interpretation should be upheld by this Court.

V. THE PRACTICAL EFFECT OF THE DECISION BELOW WOULD BE DEVASTATING, VASTLY INCREASING COSTS AND OTHERWISE SUBVERTING THE PURPOSES OF THE ACT.

A. The Decision Below Frustrates The Settled Expectations Of All Parties.

In reliance on the universally-accepted definition of "wages" which has governed the operation of the LHWCA since its adoption, the parties affected by the Act have for over 50 years confidently ordered their dealings and conduct accordingly. These parties include, among others,

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that view. In a recent study examining the flaws in the existing LHWCA, the Comptroller General stated that "[t]he act provides for total disability compensation benefits, subject to minimums and a maximum, of 66 2/3 percent of *gross pay*." Report by the Comptroller General of the United States, General Accounting Office, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending*, HRD-82-25, at p. 13 (April 1, 1982) (hereafter cited as *Comptroller General's Report*) (emphasis added). The Comptroller General's analysis of the compensation currently provided by the Act was based entirely upon a comparison between a longshoreman's gross and take-home pay while fully employed and the percentage of both that a disabled harbor worker will receive under the benefits provisions of the Act. *Id.* at 13-17. In fact, one of his major criticisms of the current compensation provisions of the Act is that they overcompensate disabled workers by failing to take into consideration the money a disabled harbor worker receives during disability from sources such as "employee benefit plans subject to the Employee Retirement Income Security Act of 1974." *Id.* at 17. Therefore, the Comptroller General—who, based upon his consideration of pay-based compensation alone, concluded that the LHWCA currently overcompensates disabled longshoremen (*id.* at 13-17, 26)—also clearly does not consider "wages" to include union fund contributions.

the workers and their unions, the employers, the insurance companies which provide coverage for those employers and, finally, the administrative and judicial entities which must ensure fair, expeditious enforcement of the Act. At no time during this long period did any of these parties ever treat union fund contributions as wages. Indeed, prior to 1977, to our knowledge no party had even suggested to the Benefits Review Board or in court that such contributions should be included, and, until the decision below, the unanimous opinion since 1977 had been that they were not. In such a situation, this Court has made clear that the "settled expectations" of the affected parties should be carefully weighed in construing the Act. *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978); *cf. Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978).

B. The Decision Below Will Produce An Extreme Increase In Costs.

In this case, the novel construction of the Act reached below not only is contrary to the parties' reasonable and well-settled expectations but will also defeat Congress' purpose to provide a quick, effective remedy following accidents and will entail enormous, destabilizing costs which were never contemplated by Congress.

In order to make plain the impact of the decision below, it will be helpful first to describe how, in practice, the LHWCA currently operates, as made clear by considerable recent data.

By 1981, according to Department of Labor estimates, approximately 905,000 employees were covered by the Act and its extensions (including the District of Columbia), an increase of over 100,000 since 1972. The number of reported injuries has increased from roughly 72,000 in 1972 to 238,000 in fiscal year 1980 and 251,000 in 1981, with the number of cases in which employees have ac-

tually lost time from work because of disability increasing from over 17,000 in 1972 to 59,000 and 61,000 in 1980 and 1981, respectively.[44]

The costs associated with these injuries is considerable and rapidly increasing. The Department of Labor estimates that the cost of compensation and medical benefits paid by employers and insurance carriers rose from $33 million in 1972 to $220 million in 1980. *Comptroller General's Report* at 5. The United States Chamber of Commerce has also estimated that employers' compensation costs have risen 6 times faster than wages since 1971.[45] For instance, in the shipbuilding industry, employers' costs under the LHWCA increased in the 10-year period between 1970 and 1980 by 851% even though wages increased only 124% over the same period. *Id.*

Current maritime-worker compensation costs dwarf the cost of compensation for other employees. The annual cost of insuring a longshoreman in 1981 was $21,000 (even though the average annual salary was only $24,000), while the annual cost under New York law for insuring a non-longshore freight-handling worker was only $3,370, and the annual cost for insuring a police officer and fireman was $1,042 and $1,254, respectively.[46] The average cost of providing LHWCA compensation pro-

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[44] *Comptroller General's Report* at 5; United States Department of Labor, 1983 Budget Justification of Appropriations Estimates for the Committee on Appropriations (Jan. 1982), ESA-33 (Table II of Longshoremen's and Harbor Workers' Compensation Act Workload Statistics FY1981-FY1983) (hereafter cited as *1983 Labor Budget*).

[45] *Longshoremen's And Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 1129 (1981) (statement by Eric Oxfeld, Employee Benefits Attorney, Chamber of Commerce of the United States) (hereafter cited as *1981 Senate Hearings*).

[46] *1981 Senate Hearings* at 1129.

tection equalled 50% of an employer's total payroll, as compared with the average for all industries of 1.5%.[47]

According to the Comptroller and studies commissioned by the Department of Labor, these currently exorbitant insurance costs are attributable, among other things, to "high accident rates" and to the "very liberal benefits" under the program. *Comptroller General's Report* at 8, 9. The result has been that some employers have sought lower-cost protection from less reliable carriers, while others have simply become self-insurers. *Id.*

The process by which benefits are awarded begins when a worker or his survivor files a claim for benefits. If the employer accepts an employee's benefits claim, it simply pays the compensation due under the Act; if not, the employer may seek adjudication of the claim at a Department of Labor district office. *Comptroller General's Report* at 4. According to the Comptroller General, 96 percent of all claims are settled at such district offices; only 4 percent reach the Office of Administrative Law Judges, of which only half are tried; 1 percent are reviewed by the Department's Benefits Review Board, and only 0.1 percent are heard thereafter by the United States Courts of Appeals. *Id.* at 5.

So long as claims under the Act are clear and undisputed, the delivery of the described benefits presents no problems. However, where disputes occur, and formal or informal adjudication is required, the system is not equipped to function expeditiously: backlogs in disputed cases run over 200 cases per claims examiner (for a total of over 11,500 at the end of fiscal year 1980), and decisions by the Board of Review are expected to require 2.5 years from the date of filing. *Id.* at 32, 42.

Nevertheless, the described current system of delivering compensation under the LHWCA, although costly and

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[47] *Id.* at 2 (statement of Sen. Nickles); *id.* at 25 (statement of Sen. Hatch).

administratively strained, is generally functioning as Congress intended, *i.e.*, for the most part it is delivering limited but certain sums in a timely manner to meet the basic needs of injured workers and their dependents. All this will change if the decision below is upheld; the practical consequences of that decision will cripple the system as it stands today.

The first and immediate effect of the decision below will of course be to increase employers' insurance premiums, self-insurers' obligations, and insurance company liabilities. While the exact amount and content of these increases is far from clear, one thing is certain: they will be staggering. Recent trade journal estimates and data gathered and presented to this Court by various *amici* show that certain collectively-bargained-for contributions are on average a minimum of $4 per hour, an amount which is at least one-third of the previously-understood definition of "wages" ("straight-time" pay received by the workers).[48] Conservatively assuming only a 30% increase in "wages" and considering that there were 50,000-60,000 claims for the year 1980, incremental payments of $60 million would have been in order for that year alone.[49] The increased payments for 1981, 1982, and 1983 would of course be greater, owing to the higher number of claims for those years,[50] and the inevitably increased "wages" costs. Plainly, even if the total-dollar increase could be limited to the 1980-1983 period, it would be at least in the hundreds of millions.

Unfortunately, it is not at all clear that the increase can be so limited. Awards under the Act may be modified

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[48] *Business Insurance*, pp. 1, 31 (Feb. 8, 1982); Ship. Br. at 4-5; Steve. Br. at 11; Alliance Br. at 11.

[49] *See* Alliance Br. at 11.

[50] The figure for 1981, excluding the District of Columbia, was 61,000 claims, and the Department of Labor estimates the 1982 and 1983 figures at 67,000 and 73,000. *1983 Labor Budget* at ESA-33.

up to one year after the last compensation payment is made in order to permit the correction of a "mistake in a determination of fact." 30 U.S.C. § 922. If the arithmetical calculation of "wages" mistakenly omitted fund contributions, and particularly since this Court has determined that modification remedies in such circumstances should be broadly construed (*O'Keeffe* v. *Aerojet General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)), the risk is great that the decision below could be held retroactive. In fact, where no final order to pay benefits has been issued, claims remain forever open to redetermination. *Intercounty Construction Co.* v. *Walter*, 422 U.S. 1 (1975). Since nearly all (96%) longshore claims are "resolved" at the district office level, and since officials at that level have had no authority since 1972 to issue final orders as to those claims, all such claims may be reopened if "wages" are now held to include fund contributions.

It would be difficult to overestimate the pernicious implications of such an outcome upon the affected parties. First, employers' costs will necessarily skyrocket, perhaps by *more* than the value of the newly-added fund contributions. This will happen because the ceiling on benefits under the LHWCA, as previously described, is *twice* the "national average weekly wage." 33 U.S.C. § 906(b)(1)(D). Hence, since the "national average weekly wage" might have to be recomputed by the Department of Labor to include fund contributions, and assuming that "wages" rose by a figure which has been conservatively estimated to be more than 30%, the maximum payout to injured workers would be increased by a greater percentage due to the raising of the statutory ceiling. The shock of this total increase, particularly if it is retroactive, would obviously be more than some employers can survive, particularly those who act as self-insurers.

Those who do survive will face enormous one-time payouts of windfall retroactive benefits, along with either substantially increased insurance premiums (for those

who can afford, and still obtain, insurance), or substantially increased payout obligations (in the case of those who can or must act as self-insurers). For their part, insurance companies will face fantastic liability for greatly increased obligations for which they never collected premiums; and, for the future, substantial additional reserves will be required along with extensive rate-setting procedures to establish new, higher premiums.[51]

Moreover, increasing an employer's insurance premiums without also increasing either his employees' productivity or the demand for their services will simply serve to increase the employer's cost of running his business. If an employer's fund contributions are a substitute for "higher straight pay" that otherwise would be tendered to employees—as the AFL-CIO has asserted in its amicus brief[52]—then increasing an employer's insurance premiums must logically lead to lower straight pay for all longshoremen, or, alternatively, it must lead to layoffs in the number of longshoremen employed. It would, in other words, price some longshoremen out of their livelihood, along with their employers.[53]

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[51] AIA Br. at 16-18.

[52] AFL-CIO Br. at 5.

[53] There is also evidence indicating that the new "wages" benefits announced by the Court of Appeals will lead to an increase in the rate of accidents suffered by longshoremen. The Report by the Comptroller General stated that:

> [e]vidence from private, long-term disability insurance programs indicates that high compensation rates cause disability incidence rates to increase. Private insurance plans with compensation rates over 70 percent of predisability gross income have incidence rates two-thirds above the average, while plans with compensation of 50 percent or less have incident rates one-third below the average. Because of this, private insurers generally attempt to limit disability benefits to 50 to 60 percent of gross earings. [*Comptroller General's Report* at 14.]

C. The Decision Below Will Raise Benefits Above Actual Wages.

Disabled workers (or their dependents) will, if the decision below stands, in most cases receive greater income after disability (or death) than they received while fully employed. The current compensation approaches that result already. The Comptroller General recently stated that "[a] March 1980 [Department of] Labor survey * * * showed that compensation under the act, on the average, equalled 88 percent of preinjury take-home pay." *Comptroller General's Report* at 13. This is due, in large part, to the fact that compensation awards are tax-free while take-home pay is not. *Id.* at 13-14 & n.1. But it is also due to the fact that compensation under the Act is not entirely or sometimes even partially offset by collateral benefits available from other federal legislation, such as the Social Security Disability Insurance Program, or private pension or welfare programs, like those presented in this case. *Id.* at 14-15. "In some cases, payments from other sources, combined with workers' compensation, could result in payments that exceed preinjury net earnings." *Id.* at 26; *see id.* at 14-15 (describing how this will occur under the International Longshoremen's Association's guaranteed annual income program).

If, then, we start with merely the 88 percent of take-home pay as the present average benefit level, and increase this by one-third for the impact of the decision below (*see* n. 48 *supra*), we end with a total benefit that is 121 percent of previous wage.

Another example of how this would occur results from the current collective bargaining agreement governing work by members of the International Longshoremen's Association in the Atlantic and Gulf Coast ports. This agreement, which is midway through its three-year term, currently provides for a $12.80 basic hourly wage, plus $4.59 per hour of work to be paid into pension, health

and welfare funds. (Locally negotiated trust benefits and those required by law are extra.)

Assuming a 40-hour work week, the longshoreman's actual wages would be $512.00. In the case of total disability under the LHWCA, the compensation rate (at 66⅔%) would be $341.32. However, if the contract fringe benefits were to be included in the computation, the base upon which the compensation rate would be applied rises to $695.60 and would yield a weekly compensation rate of $463.72, or nearly 90% of actual pre-injury wages, tax-free. This would yield a post-injury income of about $24,100 per year, or about $3,900 *more* than the pre-injury spendable income (gross wage minus Federal and State taxes and FICA) of $20,200. Thus, any economic incentive to return to work would be eliminated.

Congress never intended such a result; the benefit provisions explicitly guarantee only a fraction of "wages" as compensation. Moreover, this result is expressly contrary to one of Congress' objectives in setting compensation lower than full employment income—encouraging recovery and return to work. *See* H.R. Rep. No. 678, *supra* at 9 ("It is obvious that to grant a man full pay while disabled will tend to induce him to malinger * * *").[54]

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[54] *Id.* at 13 ("With a reduction of the rate of compensation to two-thirds of the pay, and the limitation of $66 2/3 [sic: 66 2/3%] as the monthly maximum amount that any workman could receive as compensation, regardless of the amount that he may be receiving as earnings when employed, there would be afforded a degree of stimulus to return to work, while the opportunity of continuing unemployment without loss of pay would be withdrawn").

Although these comments were made in the House Report on the 1916 Federal Employees Compensation Act, Congress adopted the same maximum compensation percentage in the LHWCA, demonstrating its intent to deter harbor workers from malingering as well.

D. The Decision Below Could Extend To All Kinds Of Employee Perquisites, Benefits, And Privileges.

The case before the Court happens to involve three particular kinds of union fund contributions, and up to this point we have phrased our arguments in terms of these particular categories. But once the definition of "wages" that has stood for 55 years is abandoned by recognition of these three categories of benefits as part of "wages," attempts will inevitably be made to extend this new concept to every conceivable kind of fringe benefit. Moreover, since most of the arguments for the extension are the same, the attempts would probably be successful in most cases. Thus, if the test is, in the words of the Court of Appeals, "*all* of the identifiable value, in whatever form it may appear," "wages" could soon come to include group term life insurance policies; medical or dental reimbursement plans; pension plans; profit-sharing plans; continuing educational programs; travel allowances to professional conferences, meetings, and seminars; unemployment compensation insurance; matching contributions to educational or charitable associations; civic furlough programs; personal or pregnancy leaves; alcohol or drug rehabilitation programs; savings plans; stock option plans; employer-subsidized cafeterias; discounts on company products; productivity or length-of-service bonuses; wage advances; and staggered hours and "flex-time" options. S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on Management* 440-441 (1960). Even such trivial items as uniforms, equipment, and free parking might have to be included, so long as there was some understanding reached with the worker that those would be provided "in return for his labor." [55] Pet. App. at 13a.

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[55] It is true, of course, that the statute requires the "wages" received by the employer to be "recompensed under the contract of hiring in force at the time of the injury * * *." But basic contract principles impose no requirement that a contract either be reduced to writing or be limited to a specific subject. 1 *Corbin on Contracts* § 3, pp. 5-8 (1963); 1 S. Williston, *A Treatise on the Law of Contracts*, § 1, pp. 1-4 (3d ed. 1957 & Supp. 1982); *Restatement* (*Sec-*

Indeed, under the lower court's view, there are arguably as many items that should be included within "wages" as there are facets of a job that could attract an employee to choose one position over another.[56] Because employees often select jobs based on benefits such as these, they may legitimately claim that these benefits were worth more to them than the higher straight-time salary offered on another job. Such benefits—"in whatever form [they] may appear"—are of some "value" to the employee, who presumably chose his current position because he valued these benefits at an amount greater than the pay or other benefits offered by alternative employment. Thus, even where an employee finds it difficult to put a dollar value on a benefit *considered by itself*, the employee may very well be able to point to foregone alternatives to demonstrate the dollar value *by comparison*. *See id.*[57] Since under the decision below benefits will no longer be "limited and determinate" and known in advance to be a "fixed amount," *Pepco, supra*, 449 U.S. at

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ond) of Contracts §§ 1 & 4 (1979). Thus, under the Court of Appeals' broad reading of the term "wages," so long as the employee reached some understanding with his employer that he was to receive a particular item in exchange for his labor—whether that understanding was written, oral, or quasi-contractual—the item would be covered "wages" under the LHWCA.

[56] As this Court has held, "[e]mployees value a job for many reasons besides the rate of pay, including, for example, the presence of other workers of the employee's own sex, the availability of recreational facilities at the worksite, staggered work hours, better health benefits, longer vacations, and so forth. What makes one job better than another varies from one employee to another." *Ford Motor Co.* v. *EEOC*, 102 S. Ct. 3057, 3068 n.26 (1982).

[57] There is, furthermore, nothing in the decision below which forecloses an employee from claiming not merely the dollar value of an employer's *contributions* to trust funds such as those involved in the present case, but also the present value of the expected *receipts* from those contributions. Thus, in cases like the present one, it could easily be argued that the value of the contingent right to receive further payments from health, pension, and training trust funds must be assessed and added to "wages."

282 n.24, it will inevitably follow that those benefits will be disputed and their delivery delayed.

E. The Decision Below Will Frustrate The Basic Purpose Of Swift, Efficient Delivery Of Benefits.

To be sure, the court below concluded that in this case the value of the fringe benefits at issue could reasonably be measured "by the amount of the employer's contributions to the various fringe benefit funds." Pet. App. 13a-14a. But even accepting that measurement approach, it ignores reality to suppose that other valuation methodologies will not be contended for (including present value of future benefit receipts); that all trust funds will be consistently constructed on a cents-per-hour-per-employee basis;[58] that the myriad kinds of employee "values" pre-

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[58] Of course, this will not be the case. Where similar benefits are provided by employers who are *self-insured*, it is quite possible that no "valuation" figures at all will be available. And even where payments are made directly to trust funds, it is not uncommon for them to be far more complex in nature than the funds in this case. For example, trust fund payments on the docks of New York are handled quite differently from those presented here.

In New York, a flat sum ($2 per man/hr.) is paid, pursuant to a collective bargaining agreement, into a primary welfare trust fund, and another flat sum ($3 per man/hr.) is paid into a primary pension trust fund. However, each primary fund is actually composed of separate trust funds, operating under separate trust agreements. Once payment has been made into the primary fund, the trustees, with the help of their actuaries, determine how much will go to each of the constituent funds. Their judgment is based upon an estimate of the amount per year needed to operate each fund. Thus, in one year, $1 may go into fund A, $.50 into fund B, $.25 into fund C, and so on. In another year, even though the basic payment may remain the same, the amount allocated to each separate fund may vary from the year before. Thus, what each injured employee or survivor of a deceased employee *receives* is not determined by the collective bargaining agreement, but rather by the various trust fund agreements and the independent decisions of the trustees. And, in turn, what is paid out also depends upon a number of factors, such as the number of years the employee has been in the workforce. In fact, some of the fund agreements provide that if a worker

viously discussed will not quickly become the subject of thousands of compensation claims; that longshoremen will not take advantage of the opportunity to "earn" workers' compensation benefits exceeding their pre-injury income; and that the promise of attorney's fees available in any case where compensation is obtained beyond that voluntarily paid (33 U.S.C. § 928(a)) will not provide an additional incentive to litigate these issues.

The only realistic assessment of the impact of the decision below is that enormous difficulties will be encountered by employers who in good faith attempt to assess a per-employee "value" of fringe benefits, as defined by the court below; by the Department of Labor which must calculate such values *nationwide* in order to compute a "national average weekly wage," both for the future and retroactively; and, most importantly, by the already-overburdened administrative agencies (*see Comptroller General's Report* at 30-32) and courts which will be inundated by cases litigating a wealth of "value" issues

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is out of work owing to a disability, his credits continue to accumulate in the respective funds.

A further complication is that while some funds are based on man-hours worked, others are based on tonnage, and still others are based on a combination of the two. For example, if an estimate is made at the beginning of a year that a fund will need $200,000 during that year, and it is further estimated that 200,000 man-hours will be worked, the employer will contribute $1.00 per man-hour. So in another fund, if the same amount will be needed and it is estimated that 500,000 tons will be shipped, the employer will have to contribute on the basis of $.40 per ton. But in a third type of fund, 80% of the contributions may be made on the basis of man-hours worked and 20% on a tonnage basis. This latter technique is used on the West Coast, where a defined benefit procedure has been established in the collective bargaining agreement, but the separate pension fund agreement determines who will actually be eligible for payments and how much they will receive. And even here for payments and how much they will receive. And even here the 80-20 split has to be approved by the Federal Maritime Commission, despite the fact that it is outside the collective bargaining agreement.

never seen before. The current system will almost surely be brought to its knees, and, without question, the "swift and sure" delivery of benefits which Congress intended will not be preserved.

The net result will border on an effective *judicial* repeal of the 1927 Act, exchanging the current compensation system for the state of affairs existing before workers' compensation programs were enacted. Guaranteeing a disabled worker virtually all of the benefits of full employment will in practice resurrect the system Congress interred in 1927—that is, it will substitute an uncertain tort recovery for a fixed compensation award, and litigation for swift and sure benefits.

In fact, the decision below will go the tort system one better. Notwithstanding the ⅔ limitation on compensation awards, the inclusion of fringe benefits in "wages" will in practice provide disabled workers with *greater* income while out of work than while fully employed. The opportunity to obtain such a recovery will inspire endless litigation as the administrative process and the courts struggle to define the types of fringe benefits compensated by the Act, thereby sabotaging Congress' plan to provide prompt and certain disposition of benefits and calculation of costs. *See, e.g., Norton* v. *Warner Co.*, 321 U.S. 565, 568 (1944).

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This Court has often observed that "it is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results." *Pepco, supra*, 449 U.S. at 283; *accord, e.g., Voris* v. *Eikel, supra*, 346 U.S. at 333; *Baltimore & Phila. Steamboat Co.* v. *Norton, supra*, 284 U.S. at 414. The Court has also made clear that it "cannot interpret federal statutes to negate their own stated purpose," *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 419-420 (1973), a principle the Court has twice applied to the LHWCA itself. *See Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 85-86

(1980); *Edmonds* v. *Compagnie Generale Transatlantique, supra*, 443 U.S. at 258. Both of the stated principles apply with particular force here: the decision below will produce not only incongruous results, but ones that will subvert—if not effectively repeal—the statute.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether employer contributions to union trust funds for health and welfare, pension, and training are "wages" for purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. IV) 901 *et seq.*

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In the Supreme Court of the United States

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MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL., PETITIONERS

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 670 F.2d 208. The opinions of the Benefits Review Board (Pet. App. 17a-22a, 28a-35a) are reported at 12 Ben. Rev. Bd. Serv. (MB) 87 and 6 Ben. Rev. Bd. Serv. (MB) 754. The opinions of the administrative law judges (Pet. App. 23a-26a, 36a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981. A petition for rehearing was denied on January 14, 1982. The petition for a writ

of certiorari was filed on April 13, 1982, and was granted on October 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

33 U.S.C. 902(13) provides:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

STATEMENT

1. From November 1973 until he was fatally injured while performing construction work in the District of Columbia in April 1974, James H. Hilyer was employed as a laborer by petitioner Morrison-Knudsen Construction Company ("the company") (Pet. App. 29a, 37a). Hilyer was a member of Local 456 of the Laborers' District Council of Washington, D.C. and Vicinity, which had a collective bargaining agreement with Morrison-Knudsen in effect during that time (*id.* at 6a). Under the contract, the company was required to pay each covered employee at a specified hourly rate; in addition, for each hour that each employee worked the company was required to pay 28 cents into a health and welfare fund, 35 cents into a pension fund, and five cents into a training fund (*ibid.*).[1] These funds provide employee benefits such

[1] Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c), permits an employer to contribute to trust funds established by unions for the sole and exclusive benefit of the employer's employees, provided the

as life insurance, health insurance, retirement benefits, and career training (*id.* at 9a).[2] The contributions were made directly to the trust funds, not to the employees, and the individual employees had no role in the funds' management (*id.* at 9a; J.A. 32-33).

Immediately upon Hilyer's death, the company began paying death benefits to his widow, respondent Sonia Hilyer, and his minor children pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("the Act" or "the LHWCA"), 33 U.S.C. 901 (& Supp. IV) *et seq.*, which at the time was made applicable to employment in the District of Columbia by D.C. Code Ann. § 36-501 (1973) (Pet. App. 5a-6a, 38a).[3] The statutorily prescribed

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trust funds meet certain standards specified in that subsection. See, *e.g.*, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 328-329 (1981); *Arroyo* v. *United States*, 359 U.S. 419, 420 (1959).

[2] The collective bargaining agreement specifies that the trustees shall use the payment to the health and welfare fund for the benefit of the employees, their families and dependents, "for medical, dental, and/or hospital care, compensation for injuries, and/or illness resulting from occupational activity, or for unemployment benefits, or for the purchase of insurance covering life and accidental death, accident disability benefits, hospitalization, surgical, medical and sickness benefits" and, in the discretion of the trustees, for "any other type of health and welfare benefits" (J.A. 38). Payments to the pension and disability fund must be used for pension and disability benefits (J.A. 38-39), and training fund payments must be used for "insuring adequate trained manpower to perform the work covered by this collective bargaining agreement" (J.A. 40).

[3] The District of Columbia has enacted a new workers' compensation statute, which became effective on July 26, 1982. D.C. Code Ann. § 36-301 *et seq.* (1981). The validity of that statute was recently upheld by the District of Columbia Court of Appeals. See *District of Columbia* v. *Greater Wash-*

death benefits represent a percentage of the injured employee's annual earning capacity as measured by that employee's, or a representative employee's, "average weekly wage" at the time of the injury and during the previous year. 33 U.S.C. 910. Under 33 U.S.C. 909(b), respondent Hilyer is entitled to receive 50%, and each of her two minor children 16⅔%, of the decedent's "average weekly wage"; however, the total amount may not exceed 66⅔% of such wages.[4]

Respondent Hilyer disputed the amount of the benefits being paid, contending, *inter alia*, that the calculation of her husband's "average weekly wage" erroneously failed to include his employer's contributions to the three union trust funds (Pet. App. 6a). An administrative law judge rejected her contention (*id.* at 7a, 46a), and the Benefits Review Board affirmed that portion of his order (*id.* at 33a).[5] The

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ington Central Labor Council, 442 A.2d 110 (1982), petitions for cert. pending, Nos. 82-116 and 82-146. The general definition of "wages" in the new District of Columbia statute (D.C. Code Ann. § 36-301(19) (1981)) is the same as that in the LHWCA. More specifically, however, the new statute provides that the "average weekly wage" and "total wages" includes the "reasonable value for board and lodging received from the employer plus gratuities declared for tax purposes by the employee." D.C. Code Ann. § 36-311(b) (1981).

[4] The statute also establishes a minimum level of death benefits (33 U.S.C. 909(e)) which is based in part upon the "national average weekly wage" computed pursuant to 33 U.S.C. 906(b). The LHWCA defines the "national average weekly wage" as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls." 33 U.S.C. 902(19).

[5] The Board remanded for reconsideration of the attorney's fees award (Pet. App. 34a). On remand, an administrative law judge entered a new award (*id.* at 23a-26a), which subsequently was modified by the Board (*id.* at 17a-22a).

Board ruled that the statutory definition of "wages" in 33 U.S.C. 902(13) made clear that only those "values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage" (Pet. App. 32a). Contrasting the employer payments with overtime and vacation pay, which are "wages" within the meaning of the LHWCA, the Board found the employee's right to these funds and the value to him of the trust fund contributions too "speculative" to be considered wages (*id.* at 33a). It also noted that inclusion of these forms of benefits would cause problems in computing an employee's average weekly wage by comparison to a similarly-situated employee under 33 U.S.C. 910(b) in cases, such as Hilyer's, where the injured employee did not work in the same employment for a full year (*ibid.*).

2. The court of appeals reversed (Pet. App. 4a-16a). It concluded that the employer's benefit fund contributions were identifiable, calculable values that must be included in the determination of Hilyer's average weekly wage (*id.* at 8a-9a). Although the contributions were made not to employees but to union funds over which individual workers had no control, the court found that the funds were a "channel" for the company to provide benefits to its employees (*id.* at 9a). The court also found that each of the benefits had "substantial economic value" to the employees because, without the funds, the employees would have had to spend their own money to obtain similar insurance policies, career training, or pensions (*id.* at 9a). Recognizing that the sums contributed by the employer probably would not purchase equivalent benefits on the open market, the court nonetheless concluded that "the most reasonable course is to measure the value of the fringe benefits by the amount of the

employer's contributions to the benefit funds" (*id.* at 12a).

SUMMARY OF ARGUMENT

A. The statutory definition of "wages" in the LHWCA embodies the common sense concept of wages —money paid by the employer to the employee as recompense for his labors, plus traditional nonmonetary wage substitutes such as room and board. The employer trust fund contributions at issue here, commonly thought of as fringe benefits, do not fall within these categories. Clearly, Congress did not specifically contemplate when it passed the LHWCA in 1927 that employer-financed fringe benefits, which were unusual at that time, would be treated as wages, and it has not acted to amend the statute to cover them.

Employer trust fund contributions do not fall within the statutory language as a "similar advantage" to room and board. The wage substitutes listed in the statute are immediately available and given directly to the employee, while the contributions here are paid to the union trust funds and the benefits ultimately received by the employees from these funds are only contingent. The funds do not act simply as a "channel" for benefits to pass to employees. The employee has no voice in where the contributions are invested or how the funds are administered. Moreover, the contributions, which are not taxed as income to the employee, are not truly made on the individual employee's behalf; whatever benefits he ultimately receives from the funds do not correlate directly with the contributions made as a result of his labor. See *Teamsters* v. *Daniel*, 439 U.S. 551, 560-561 (1979).

Contrary to the court of appeals view, not every item of value paid by an employer or received by an

employee as a result of his labor is to be included in the base for calculating LHWCA benefits; that base is restricted to those items of value that are "wages." This Court has indicated on several occasions in other contexts that the types of contributions at issue here are not generally encompassed by the term "wages." See *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959). In the specific context of LHWCA benefits, the longstanding administrative interpretation, upheld by the Benefits Review Board, has been that employer trust fund contributions are not "wages," and they have never been included by the Bureau of Labor Statistics in the calculation of the "national average weekly wage," upon which minimum and maximum LHWCA benefit levels are based.

Significantly, in 1964 Congress amended the Davis-Bacon Act, 40 U.S.C. 276a, a statute enacted at approximately the same time as the LHWCA, to include employer trust fund contributions in the definition of "wages." Congress' failure to alter the original definition of "wages" in the LHWCA, particularly in light of the established administrative practice, strongly indicates that such contributions should not be read into the wage base for computing LHWCA benefits.

B. The court of appeals erred in relying on a rule of liberal construction in favor of the claimant, even though his right to recover under the Act was not disputed, without giving due consideration to other policies of the Act. The LHWCA is to be liberally construed to effectuate its remedial purposes, but the decision below does not further the purposes of the Act. Most of the employee benefits that are attributed to trust fund contributions are ones that LHWCA beneficiaries do not need to purchase independently in the future. For example, to the extent that an em-

ployee receives a life insurance policy as a result of contributions to the trust fund, the beneficiaries receive the proceeds of that policy upon the employee's death, and they do not have to bear any future expense of paying premiums on a policy on the employee's life. Other trust fund benefits such as training, disability insurance, and unemployment insurance are also irrelevant once the employee is no longer employed. By the same token, an LHWCA beneficiary does not have to spend money to provide for a future pension, because LHWCA award payments do not cease when the covered employee would have reached retirement age. Thus, the policy underlying the provision of LHWCA benefits is not furthered by increasing the level of those benefits to account for employer trust fund contributions.

Moreover, the court of appeals' decision creates serious practical problems in the administration of the LHWCA that will substantially undermine other policies of the Act. The question of the amount of the LHWCA benefit is only rarely litigated under the present system; the decision below invites an explosion of such litigation in the future over the issues of whether particular fringe benefits should be included in the wage base and how those benefits should be valued. This increase in litigation in cases that otherwise might have been uncontested or settled informally will overwhelm the already strained LHWCA administrative system and seriously impair the Act's important policy in favor of prompt and certain disposition of claims.

The inclusion in the wage base of employer contributions to union trust funds also raises the likelihood that the LHWCA award of many employees will exceed the take-home pay that they received while working, thus giving disabled employees a strong dis-

incentive to return to work. Finally, if the decision below is upheld, it would be anomalous if trust fund contributions were not also included in the "national average weekly wage." This would significantly complicate the task of the Bureau of Labor Statistics in calculating that figure and might well make it impossible to meet the timetable mandated by statute. See 33 U.S.C. 906(b)(3).

ARGUMENT

EMPLOYER CONTRIBUTIONS TO UNION TRUST FUNDS ARE NOT PART OF AN EMPLOYEE'S "AVERAGE WEEKLY WAGE" FOR PURPOSES OF COMPUTING BENEFITS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

A. The Statutory Definition Of "Wages" Does Not Include Employer Contributions To Union Trust Funds

1. The inquiry into whether employer contributions to a union trust fund are part of an employee's "average weekly wage" begins with the language of the statute. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). "Wages" are expressly defined in the LHWCA, 33 U.S.C. 902(13), as the "money rate at which the service rendered is recompensed * * *, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received * * * from others than the employer." The plain meaning of this definition is that LHWCA "wages" embody the common sense concept of wages, *i.e.*, the actual money payments made to an employee by his employer as recompense for his labors, tips from customers that supplement this salary, and traditional nonmonetary wage substitutes supplied by the employer, such as room and board. The employer trust fund contributions at issue here, which are commonly thought of

as fringe benefits rather than wages, do not fall into any of these categories and thus do not appear from the face of the statute to be "wages" within the meaning of 33 U.S.C. 902(13).

There is nothing in the legislative history of the LHWCA that modifies the apparent meaning of the statutory definition and indicates a congressional intent that trust fund contributions by employers be treated as part of an employee's "average weekly wage." Hence, the statutory language is controlling. See, *e.g.*, *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981). Indeed, it is clear that Congress did not contemplate when it passed the LHWCA in 1927 that such benefits would be considered "wages," because employer-financed fringe benefits were quite unusual at that time;[6] hence, Congress could not have intended to include them in the base used to calculate disability and death benefits. In the absence of any change in the statute, therefore, it would appear that such fringe benefits are still not included today, even though they have become more common. Cf. *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 280 (1980) (where statute has not been amended, conditions prevalent when LHWCA was passed are most indicative of congressional intent). In the view of the court of appeals, however, Congress defined "wages" in such a flexible and broad fashion that, without amendment, the original definition now extends to employer trust fund contributions not con-

[6] A Labor Department publication from that era documents that it was unusual for employers to provide such health and welfare and pension benefits to their employees. See United States Bureau of Labor Statistics, *Beneficial Activities of American Trade Unions*, Bul. No. 465, at 2-4, 31, 139, 148-152 (Sept. 1928). See also S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964).

templated at the time. See Pet. App. 8a-9a; see also *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d 1336, 1344 (9th Cir. 1982). But the court's assumption that LHWCA wages include all "values received by an employee that are readily identifiable and calculable" (Pet. App. 8a) ignores the language of the statutory definition and its clear limitations.

The court of appeals emphasized (see Pet. App. 13a) that the definition of "wages" in Section 902(13) is not restricted to monetary salary payments but includes other forms of compensation as well. The trust fund contributions at issue here are quite different, however, from the types of alternative compensation specified in the statutory definition—"board, rent, housing, lodging, or similar advantage." Those benefits are nonmonetary wage substitutes that are easily converted to a monetary value and that are provided directly to the employee by the employer for the employee's immediate use. Hence, unlike the contributions here, they are generally taxable to the employee when received.[7] The contributions at issue here, by contrast, are payments made directly to the union trust funds. It is these funds that provide the employee with whatever insurance policies or contingent benefits he receives. Nor are the benefits immediately available. Under the pension and disability plan involved here (J.A. 58-71), for example, in no event can an employee receive any benefit before he reaches the age of 55. And many

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[7] Meals or lodging furnished for the convenience of the employer, if they are furnished on the business premises, and, in the case of lodging, if it is a required condition of employment, are excluded from gross income under 26 U.S.C. (& Supp. IV) 119.

employees, including James Hilyer himself,[8] will never receive any benefits because of service and vesting requirements.

The court of appeals stated (Pet. App. 9a) that the funds "are no more than a channel" by which the employer provides certain benefits for the employees. But it cannot be maintained that the situation here is no different than if the employer had made the contributions directly to the employee, who then invested them in the union funds. The fact that the employee does not receive the contributions from the employer is more than a technicality; he has no choice whether to invest the money in union funds and he has no voice in how the funds are administered (see J.A. 32-33). Moreover, the funds are administered in such a manner that the benefits for a particular employee are not tied directly to the contributions made by the employer that correspond to the hours worked by that employee; hours worked are used as a convenient way to measure an employer's overall obligation to the fund, not as a means of measuring its obligation to any particular employee. See *Teamsters* v. *Daniel*, 439 U.S. 551, 560-561 (1979).[9] Thus, it

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[8] Hilyer did not work for petitioner Morrison-Knudsen for at least one year (Pet. App. 29a) and therefore apparently did not even qualify for a death benefit under the union pension plan (see J.A. 68).

[9] For example, under the pension and disability plan agreement involved here, the amount of an employee's pension credit has no direct correlation with his hours worked for which the employer has made contributions to the fund. Employees receive pension credit for hours worked during years when no employer pension fund contributions were required (J.A. 60-61). Employees receive no pension credit for fewer than 200 hours worked during the calendar year, even though the employer is obligated to make pension contributions for those hours (J.A. 61). Employees receive the same pension

is not even accurate to describe the contributions held by the court of appeals to be part of Hilyer's "average weekly wage" as actually having been made on Hilyer's behalf. *Ibid.*[10] Indeed, the fact that these types of employer contributions cannot be equated with a particular employee's compensation is reflected in the specific exclusion of such contributions from gross income under federal income tax law. See 26 U.S.C. 106. In short, it stretches the language of the statute beyond acceptable limits to hold that the employer trust contributions at issue here are a "similar advantage" to board and lodging.[11]

2. The court of appeals' decision fails to recognize the limitations inherent in the LHWCA concept of "wages." The court's conclusions that trust fund "contributions are an important part of the employees' total compensation, and an equally important part of the employer's labor cost" (Pet. App. 10a-11a n.7), and that "each of these benefits has substantial eco-

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credit for working widely different numbers of hours; for instance, they receive ⅛ credit for working any amount between 200 and 400 hours per calendar year (J.A. 61). And, of course, an employee may lose credit for hours for which contributions have been made, and thus never receive any pension benefits, if he has not vested in the plan (J.A. 61-62).

[10] The notion that training fund contributions are made on the employee's behalf is even more illusory. The purpose of the training fund is to "insur[e] adequate trained manpower to perform the work covered by [the] collective bargaining agreement" (J.A. 40) and thus does not even appear to be directed at benefitting individual employees.

[11] In this connection, it is noteworthy that the new District of Columbia workers' compensation statute specifically provides that "total wages" include the value of "board and lodging" but makes no mention of trust fund contributions. See D.C. Code Ann. § 36-311(b) (1981); note 3, *supra*.

nomic value to the employees" (*id.* at 9a) miss the point. Not every item of value paid by an employer or received by an employee as a result of his labor is encompassed by the term "wages."

Certainly the concept of "wages" does not necessarily cover the fringe benefits involved here. This Court has specifically held in other contexts that employer trust fund contributions are not encompassed by the term "wages." The leading case is *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), where the Court held that such employer contributions were not entitled to the priority given "wages * * * due to workmen" under the old Bankruptcy Act, 11 U.S.C. 104(a)(2).[12] The Court stated that "not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to employment." 359 U.S. at 32. The Court then explained that the fund contributions lacked "the customary attributes of wages" (*id.* at 33) because the amounts were unrelated to the particular employee's productivity, the employee had no legal interest whatsoever in the contributions, which were made directly to the funds, and the collective bargaining agreement itself made clear that the parties considered these payments to be something other than wages. *Id.* at 32-33. See also *Joint Industry Board* v. *United States*, 391 U.S. 224 (1968) (employer contributions to a plan containing individual annuity accounts are not "wages" under 11 U.S.C. 104(a)(2)).

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[12] In the new Bankruptcy Code, Congress has directly addressed this question and has drawn an explicit distinction for priority purposes between wages and fringe benefits like the trust fund contributions involved in this case. See 11 U.S.C. (Supp. V) 507(a)(3), (4).

In addition, with respect to pension benefits in particular, the Court has noted in connection with veterans' reemployment rights that pension benefits are predominantly a reward for length of service, not compensation for work performed. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-594 (1977). The Court acknowledged that the cost of pension benefits is a current one that "is a subject of collective bargaining, and future benefits may be traded off against current compensation," but it explained that these features are characteristic of any benefit and therefore "of little assistance in determining whether a particular benefit recompenses labor or rewards longevity with an employer." *Id.* at 592-593. See also *Teamsters* v. *Daniel*, *supra*, 439 U.S. at 560 ("[o]nly in the most abstract sense may it be said that an employee 'exchanges' some portion of his labor in return for [potential pension] benefits").

The court of appeals found (Pet. App. 13a) that *Embassy Restaurant* was of no relevance here because the statute in that case applied strictly to "wages," not to additional forms of compensation. This distinction is specious because both cases involve the meaning of the term "wages" in the pertinent statute; the fact that the LHWCA expressly considers gratuities and room and board to be wages does not alter that inquiry.[13] Nonetheless, the court below

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[13] Moreover, what the court of appeals apparently found to be significantly different about the LHWCA was its specific mention of nonmonetary wage substitutes such as room and board. The trust fund contributions are in monetary form, however, so this factor seems irrelevant. In any event, the reasons given by the Court in *Embassy Restaurant* why trust fund contributions lack "the customary attributes of wages" (359 U.S. at 32-33) are equally applicable even if wages include such benefits as room and board supplied by the employer to the employee.

rejected *Embassy Restaurant* and erroneously relied (Pet. App. 11a-12a) on an earlier case, *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957). But *Carter* does not support the decision below. In *Carter*, the Court found that a federal contractor's surety was liable under the Miller Act, 40 U.S.C. 270a *et seq.*, for employer trust fund contributions. As the Court explained in *Embassy Restaurant* (359 U.S. at 34-35), the *Carter* Court was not construing the term "wages"; rather, the Miller Act covered all "sums justly due" the employees under the contract, and the Court held that this broader language covered all the obligations of the contractor under the collective bargaining agreement. 353 U.S. at 216-218. Indeed, the *Carter* Court specifically noted that the contributions there, by the explicit terms of the trust agreement, were not to be deemed wages. *Id.* at 214, 217. Significantly, the plaintiffs in *Carter* were the trustees of the funds. The Court recognized that the employees themselves had no rights in the contributions. *Id.* at 214. Thus, it is difficult to read *Carter* to support the contention of an individual employee that trust fund contributions must be included in his wage base for the computation of workers' compensation benefits.[14]

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[14] The court of appeals' reliance (Pet. App. 10a n.6) on two lower court cases recognizing that fringe benefits such as trust fund contributions are mandatory subjects of collective bargaining under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is similarly misplaced. Whether a particular benefit is subject to mandatory collective bargaining (as "wages, hours of employment, or other conditions of employment" (29 U.S.C. 159(a)) does not control whether it should be included in a wage base for workers' compensation benefits. Indeed, this Court has twice specifically rejected the contention that the classification of a particular benefit as

In the specific context involved here, the longstanding practice under the LHWCA has been that employer trust fund contributions are not "wages." From the inception of the Act, the Department of Labor has taken the position that fringe benefit contributions by employers are not part of the "average weekly wage" under the LHWCA. This interpretation is reflected in a 1968 Labor Department memorandum and legal opinion on the subject, which noted some of the arguments made in favor of including such fringe benefits in wages but concluded that it would be "improper" to argue for such a statutory interpretation because of the history of the Act and the Department's past practice of excluding fringe benefit contributions. Rather, the memorandum concluded, any change in the treatment of fringe benefit contributions would have to come from Congress. See United States Department of Labor, Wage and Labor Standards Administration, Bureau of Employees' Compensation, *LS/WH Program Memorandum No. 32* (June 17, 1968) (*reprinted in* American Insurance Association Amicus Br. in Support of Petition App. 1a-4a).[15] Moreover, the Bureau of Labor

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"wages" subject to mandatory bargaining under the NLRA is controlling in another context. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 592 n.16; *United States* v. *Embassy Restaurant, Inc.*, *supra*, 359 U.S. at 33 & n.10.

[15] The Department of Labor briefly departed from this longstanding interpretation in the litigation of this case before the court of appeals. The Director of the Office of Workers' Compensation Programs petitioned for review of the Benefits Review Board's order and contended that the employer's fund contributions here should have been included in determining Hilyer's average weekly wage. Upon further consideration, the Department of Labor has concluded that the correct interpretation of the LHWCA is that fringe benefits are not "wages" within the meaning of the Act, thus reverting to its previous,

Statistics has never included these contributions in its calculation of the "national average weekly wage," which, because of its role as a benchmark in setting minimum and maximum benefits, logically should contain the same ingredients as the individual "average weekly wage." The Benefits Review Board, the administrative body that hears appeals from the administrative law judge in all LHWCA cases, also has consistently held that fringe benefits are not "wages" for the purposes of computing LHWCA benefits. See, *e.g.*, *Collins* v. *Todd Shipyards Co.*, 5 Ben. Rev. Bd. Serv. (MB) 334 (1977).[16]

Given the longstanding administrative practice under the Act, the administrative interpretation that trust fund contributions are not LHWCA "wages" should be entitled to some deference. See, *e.g.*, *E.I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The fact that the LHWCA has been amended on several occasions, and was extensively amended in 1972, but no change has ever been made

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longstanding interpretation. The Director urged this view in *Duncanson-Harrelson Co.* v. *Director, OWCP*, *supra*, and he has apprised the Fifth Circuit of his position in connection with its consideration of two cases that are being held pending the decision in this case. *Levis* v. *Farmers Export Co.*, No. 81-4258; *Waters* v. *Farmers Export Co.*, No. 81-4273.

[16] In *Minick* v. *Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), the Benefits Review Board stated that it would follow the decision below, hence reversing its prior view on this issue. On July 29, 1982, the Board granted the Director's motion for reconsideration in *Minick* and announced that it would hold the case in abeyance pending the Ninth Circuit's decision in *Duncanson-Harrelson Co.* v. *Director, OWCP*, *supra*. The Director has now moved that the Board stay its reconsideration of *Minick* pending this Court's decision in the instant case.

in the definition of "wages" to include the trust fund contributions that have become a common feature of collective bargaining agreements, further buttresses the case for following the administrative construction. See, *e.g.*, *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); *Red Lion Broadcasting Corp.* v. *FCC*, 395 U.S. 367, 381 (1969).[17] Moreover, both

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[17] The Senate recently passed a bill entitled "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1982" (S. 1182, 97th Cong., 2d Sess. (1982)), which, *inter alia*, expressly excludes fringe benefits from the LHWCA definition of "wages." See 128 Cong. Rec. S9202-9217 (daily ed. July 27, 1982). Section 2(c) of the bill provides:

> (c) Section 2(13) is amended to read as follows:
>
> (13) the term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including but not limited to employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit fund or trust for the employee's or dependent's benefit, or any other employee's dependent entitlement.

Id. at S9212. The accompanying Senate Report explains that the purpose of the amendment is "to confirm past practice and congressional intent and to reaffirm the previously settled rule that fringe benefits are excluded from the definition of 'wages'" (S. Rep. No. 97-498, 97th Cong., 2d Sess. 41 (1982)), and that "the Committee [on Labor and Human Resources] expressly rejects the holding in *Morrison-Knudsen* v. *Director, OWCP*, 670 F.2d 208 (D.C. Cir. 1981)" (S. Rep. No. 97-498, *supra*, at 31).

employers and insurers have long ordered their affairs on the basis that these contributions are not included in the wage base for LHWCA benefits,[18] and their reasonable expectations should not be defeated in the absence of any clear indication by Congress. See *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978).

Congress' treatment of "wages" in the context of the Davis-Bacon Act, 40 U.S.C. 276a, confirms the view that legislative action is required in order to bring employer trust fund contributions within the definition of LHWCA "wages". The Davis-Bacon Act provides that wages paid on federally funded construction projects should accord with prevailing local wages. The Act, as originally passed in 1931, did not define "wages." In 1964, Congress amended the statute by inserting a definition of "wages," 40 U.S.C. 276a(b), to establish that employer benefit fund contributions would be considered "wages" for the purposes of the Act.[19]

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[18] Commercial workers' compensation insurance carriers have not included fringe benefits in the LHWCA benefit wage base when calculating premiums. See Alliance of American Insurers and National Association of Independent Insurers Amicus Br. 3. And testimony before Congress shows that employers have not considered them to be part of the wage base. See, *e.g.*, *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 182-183 (1972) (remarks of Ralph Hartman, representative of the Shipbuilders Council of America).

[19] Contrary to respondent Hilyer's suggestion (Br. in Opp. 8), the fact that Congress amended the Davis-Bacon Act in this fashion does not indicate in any way that it intended trust fund contributions to be included in the wage base for

In making this change, Congress explained that such fringe benefits were rare when the Davis-Bacon Act was enacted in 1931 (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)); hence, the concept of wages in the existing statute did not include those fringe benefits. Congress recognized that the courts had held trust fund contributions to be bargainable under the NLRA and to be "sums justly due" under the Miller Act (see pages 16-17 & note 14, *supra*), the decisions relied upon heavily by the court below (see Pet. App. 10a-12a), but nevertheless concluded that legislative action was required to include those contributions as "wages" within the meaning of the Davis-Bacon Act. By the same token, trust fund contributions were not encompassed within the concept of "wages" in the LHWCA when it was enacted in 1927, and Congress' failure to amend the LHWCA as it did the Davis-Bacon Act, although extensive amendments were made to the LHWCA in 1972, suggests that those contributions still should not be treated as "wages" under the LHWCA. See *United States*

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computing LHWCA benefits. The two statutes have completely different purposes. Congress believed that it was necessary to include these payments in "wages" under the Davis-Bacon Act because otherwise the minority of employers in an area who did not provide these benefits would have an unfair bidding advantage over those who did provide them. S. Rep. No. 963, 88th Cong., 2d Sess. 3 (1964). By the same token, failure to include these contributions would allow contractors from outside the local area to enter lower bids. *Id.* at 2. Thus, because the Davis-Bacon Act is concerned with competition between employers, it was important for Congress to consider these contributions, which affect employers' costs. That reason has no application in the LHWCA context, however, where the focus is not on the employers' costs but on compensating individual employees for their lost wages.

v. *Embassy Restaurant, Inc.*, *supra*, 359 U.S. at 31-32.[20]

B. The Court Of Appeals' Interpretation Is At Odds With Important Policies of the LHWCA

In interpreting the LHWCA to include employer trust fund contributions, the court of appeals explained (Pet. App. 13a) that it was bound to construe the Act "liberally, resolving doubts in favor of the claimant." See also *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d at 1344. This rule of construction, however, does not apply with full force in this context. It has long been recognized, of course, that, as a remedial statute, the LHWCA is to be liberally construed to effectuate its purposes. See, *e.g.*, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U.S. 408, 412-413 (1932). Because the primary purpose of the Act is to afford compensation for injured employees, there is a policy of resolving doubtful cases in favor of the claimant where the issue is whether he is entitled to recover at all under the Act, rather than leave an injured employee without compensation. Where, as here, the entitlement to recovery is undisputed, however, and the dispute is over the amount of compensation, this rule of con-

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[20] Contrary to the suggestion in *Duncanson-Harrelson Co.* v. *Director, OWCP*, *supra*, 686 F.2d at 1344 n.6, the fact that, unlike the pre-1964 Davis-Bacon Act, the LHWCA contains a definition of "wages" does not suggest that fringe benefit contributions can be brought under the LHWCA without legislative action. Because employer trust fund contributions are not a "similar advantage" to room and board (see pages 10-12, *supra*), the definition of "wages" in the LHWCA does not cover these contributions any more than the undefined term "wages" did in the old Davis-Bacon Act.

struction does not argue as strongly for resolving doubts in favor of the claimant, since it is not the purpose of the LHWCA to maximize the amount of the benefits.[21] Rather, other policies of the Act may weigh against a ruling in favor of the claimant. Thus, in *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 281-282, for example, the Court rejected the contention that the Act should be liberally construed to permit recovery for a permanent partial disability in excess of that provided by the statutory schedule, 33 U.S.C. 908(c).

1. The court of appeals' interpretation does not further the purposes of the Act. The purpose of keying LHWCA benefits to individualized wages is to correlate the benefits with what has been lost by virtue of the employee's death or disability, *i.e.*, to provide funds for the employee or his family to pay the bills that can no longer be paid with the employee's wages. See generally 1 A. Larson, *Workmen's Compensation Law*, § 3.30, at 19-20 (1978); H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927).[22] Viewed in this light, it is apparent that it makes little sense for most of the trust fund contributions involved here to be included in the wage base for comptuing LHWCA awards. For example, some of the contributions paid by the company to the health and welfare fund provided policies on the

IF SURVIVANCE

[21] Indeed, the Act places a ceiling on the disability benefits that can be received regardless of the level of the employee's wages. 33 U.S.C. 906(b)(1).

[22] Of course, the LHWCA does not purport to provide full compensation for lost wages (see *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 281-282 & n.23), but the percentage of compensation allowed by Congress is tied to the employee's actual pre-injury wages.

lives of the employees. An LHWCA award is not needed to replace that benefit once an employee is deceased. The LHWCA beneficaries have already received the full benefit, as the beneficiaries of the life insurance policy, of the contributions made during the employee's employment. Because, after his death, they do not have to bear the continuing expense of paying premiums on an insurance policy on the employee's life, there is no need to increase the LHWCA death benefit to compensate for the absence of future trust fund contributions. In addition, several of the other health and welfare fund benefits, such as disability insurance and unemployment insurance, have no application once the employee is no longer employed, and hence the LHWCA award should not be increased in an attempt to provide funds for the employee's family to purchase those benefits on its own. The contributions to the training fund, to the extent they are benefits to the employee at all (see note 10, *supra*), certainly provide no benefits that must be purchased independently once the employee has become disabled or has died.

Similarly, inclusion in the LHWCA wage base of employer contributions to a pension trust fund does not advance the policies of the Act. Upon an employee's death, his family receives a death benefit according to the terms of the plan that corresponds to the contributions already made by the employer to the plan; if an employee is disabled, he receives a pension depending on the degree to which he is vested in the plan.[23] Plainly, no LHWCA award is

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[23] As noted above (note 8, *supra*), because James Hilyer was not employed by the company for one year prior to his death, his family does not appear to have been entitled to any death benefit under the pension plan.

needed to "replace" these benefits that are actually received. Nor can it be said that the LHWCA award must take into account the surviving family's need to provide for retirement now that the employee is no longer accruing pension credits. There simply is no such need. The point of a pension is to provide income for an individual or a family when retirement has eliminated their regular source of income, namely, wages for employment. But when the regular source of income is an LHWCA award, a pension is unnecessary because the LHWCA payments do not cease when the employee would have reached retirement age. In other words, an LHWCA death or disability benefit comes with its own pension. To increase the level of that benefit in order to provide funds to purchase imaginary pension benefits that are in fact unnecessary creates a double recovery. See *Freer* v. *Duncanson-Harrelson Co.*, 9 Ben. Rev. Bd. Serv. (MB) 888, 891-892 (1979), aff'd in part & rev'd in part, 686 F.2d 1336 (9th Cir. 1982). In short, inclusion of employer trust fund contributions in the wage base for computing LHWCA benefits does not advance the policies underlying the provision of those benefits.

2. Moreover, the decision of the court of appeals creates serious practical problems in the administration of the LHWCA that will substantially undermine other policies of the Act. First, the decision introduces a new issue into workers' compensation proceedings. Heretofore, with rare exceptions, only money wages have been included in the LHWCA wage base and hence there has been little dispute over the amount of the benefit. If the decision of the court of appeals is upheld, however, it can be expected that many cases will involve the questions of what fringe benefits are to be included in the wage

base and how their value is to be computed. The court's formulation that the wage base must include "*all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of his injury" (Pet. App. 13a) is quite broad and consequently will invite a myriad of claims that particular fringe benefits should be included. And if it is determined that the wage base must include a particular fringe benefit, litigation is bound to ensue over the method of assigning a monetary value to that benefit.[24]

Increased litigation over fringe benefits inevitably will frustrate the LHWCA's important policy in favor of prompt and certain disposition of claims. See *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 282; *Cardillo* v. *Liberty Mutual Life Insurance Co.*, 330 U.S. 469, 476 (1947); *Norton* v. *Warner Co.*, 321 U.S. 565, 568-569 (1944). Under the existing system, where the amount of the wage base is rarely disputed, the vast majority of claims are not contested. Even with respect to those contested claims, many are resolved by informal conferences conducted by Labor Department deputy commissioners without resort to formal hearings before the Department's administrative law judges and subsequent appeals to the Benefits Review Board and the courts of appeals. Thus, the lengthy delays

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[24] Because the employer contributions involved here are in monetary form, the court of appeals sidestepped the valuation problem by designating the amount of those contributions as the "value" to be included in the wage base, even though the court recognized that these amounts did not represent the true economic value to the employee of the contributions (see Pet. App. 12a). With other types of fringe benefits, it will not be so simple to avoid the valuation problem in this manner.

these proceedings can engender are avoided.[25] The fringe benefit litigation invited by the court of appeals' decision will substantially increase the number of claims subject to these delays. And that problem is exacerbated by the fact that the resulting increase in litigation will overwhelm the LHWCA administrative system at a time when the system is already severely overburdened.[26]

Second, the increased awards that result from including trust fund contributions in wages will increase the disincentive for disabled employees to return to work. Because compensation awards are not taxable income to the recipient, an injured worker receiving an LHWCA award of 66⅔% of his earnings plus employer trust fund contributions may well have more disposable income than he did when work-

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[25] In fiscal year 1980, proceedings before the administrative law judges averaged four to four and one-half months. Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 41 (Apr. 1982). The Benefits Review Board took an average of 10 months to decide a case, and, because of an increased workload, future decisions may take up to two and one-half years. *Id.* at 41-42. Proceedings in the court of appeals range from several months to years in length, depending on the circuit.

[26] A recent government study concluded that the LHWCA administrative staff is not sufficient to handle its present workload. Report of the Comptroller General of the United States, *supra*, at 30-32. The Office of Workers' Compensation Programs estimates that approximately 75% of the 59,594 lost-time injuries reported in fiscal year 1980 (excluding District of Columbia claims) (see *id.* at 31) resulted in compensation payments. The number of cases referred to administrative law judges that year was 2526, or just under 5% of the total. *Id.* at 41. Thus, a decrease as small as 5% in the number of cases resolved amicably would double the number of cases requiring formal adjudication.

ing and paying tax on his earnings. This disincentive already exists for certain highly-paid workers (see Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 13-17, 26 (Apr. 1982)), but the inclusion of these fringe benefits in wages would greatly exacerbate the problem. Plainly, the purposes of the LHWCA are not served by the creation of such a disincentive to employment. See 1 A. Larson, *Workmen's Compensation Law* § 2.50, at 12 (1978); *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 291 n.9 (Blackmun, J., dissenting).

Third, the court of appeals' decision creates a problem with respect to the computation of the "national average weekly wage," upon which minimum and maximum LHWCA benefit levels are based. To date, the national average weekly wage has been computed without including fringe benefit trust fund contributions. Given the relationship in the statutory framework between the national average weekly wage and an individual's average weekly wage, however, it would be quite anomalous to include trust fund contributions in one category and not the other.[27] On the other hand, to require the Bureau of Labor Statistics (BLS) to collect fringe benefit data so that its calculation of the national average weekly wage accords with the decision of the court below concerning individual wages would substantially complicate its task. At a minimum, it would introduce significant delays in calculating the national average

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[27] The "national average weekly wage" is defined separately in 33 U.S.C. 902(19), but that definition does not suggest that the forms of compensation included should differ from those included in the determination of an individual's average wages.

weekly wage and might well make it impossible for the BLS to meet the timetable set forth in the statute for the calculation of the national average weekly wage. See 33 U.S.C. 906(b)(3) (national average weekly wage for three quarters prior to June 30 must be made within three months). It is also likely to create massive valuation problems for the BLS.[28]

In sum, there are compelling reasons why Congress would not wish employer trust fund contributions to be included within an employee's "average weekly wage." Indeed, the approach most consonant with all of the LHWCA's policies is that such employer contributions are not "wages" under the Act. Accordingly, in the absence of any legislative indication to the contrary, the LHWCA should be interpreted in accordance with Congress' original intent, and these contributions should not be included in the wage base for computing LHWCA benefits.

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[28] From 1959 through 1977, the BLS periodically surveyed employer expenditures for employee compensation in private nonfarm industries. See, *e.g.*, United States Department of Labor, Bureau of Labor Statistics, *Employee Compensation in the Private Nonfarm Economy, 1977*, Summary 80-5 (Apr. 1980). The survey distinguished between "wages and salaries," which included all direct payments to workers, and "supplements to wages and salaries," which included payments for retirement, health benefit, and unemployment benefit programs, both private plans and government programs such as Social Security and workers' compensation. See *id.* at 4-7 & nn. 3, 4. While the BLS was able to collect this data, the 1977 figures were not published until April 1980, a delay of more than two years. This BLS survey program was discontinued after the 1977 survey "due to budget constraints." *Id.* at 1 n.2.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM,1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT HILYER

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QUESTIONS PRESENTED

1. Whether the interest of a decedent in union pension, medical and training plans, which were funded by a collective agreement with his employer and were determined in amount by reference to his working hours, are to be included in his death benefit under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether in such a case the fact of his dying before a pension could "vest" under the union plan or before he would require further medical or training assistance, makes the value of his equity too speculative to be included.

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IN THE

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OCTOBER TERM,1982

No. 81-1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT HILYER

RESTATEMENT OF THE CASE

James Hilyer was killed in April 1974 in the course of tunneling work during the construction of the D.C. Metrorail System. He was employed as a laborer by the petitioner, Morrison-Knudsen Construction Company, and included as a beneficiary of a collective bargaining contract between that company and his union, Local 456 of the Laborers' District Council of Washington, D.C., and Vicinity (AFL-CIO), (PX 3, J.A. p. 36 *et. seq.*).

The contract called for an hourly work-rate which, with the usual deductions, was to be paid directly to Hilyer, and provided in addition that, for each hour of his work time, his employer would pay an additional 68¢ into three union trust funds managed, as required by Section 302(c) of the Labor-Management Relations Act of 1947, for the pension, medical and training requirements of himself and his family.

The health and welfare portion of the agreement is typical. It read as follows:

> "Section 5. The parties hereto agree to continue to operate the Health and Welfare Fund known as Laborers' District Council Trust Fund No. 3 for the benefit of the employees covered by this Collective bargaining agreement. The Employers agree to pay to such fund an amount equal to twenty-eight cents ($.28) per hour. . .for all hours worked by the employees who are covered by this Agreement. . .The trustees shall use the payments to the Fund for the benefit of the Subway and Rapid Transit Laborers, their families and dependents,. . ." Ex. 3, pp. 61-2; J.A. pp. 37-8).

The pension fund provisions were esentially similar:

> "The employers shall pay. . .($.35) per hour for all hours worked by employees. . .for the [members]. . .and their families. . ." (Ex. 3, pp. 63-4; J.A. p. 39).

The training fund at $0.05 per hour was limited to

> "...the work covered by this collective bargaining agreement"

but did not in words specify that it was earmarked for the families of members (Ex. 3, p. 65; J.A. p. 40).

Hilyer was survived by his widow, the respondent Sonia Hilyer, and his two minor sons. The amount of her death benefit under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"; 33 U.S.C. § 901 *et seq.*;[1] Pet. App. p. 52a) as paid by the petitioner carrier was objected to as improper under two provisions of the statute, first, that the amount should have been calculated against the annual earnings of a comparable laborer under Sec. 10(b), and second, that the carrier had excluded Hilyer's union fund interests as being any part of his compensation base.

These claims went to trial before an administrative law judge who sustained Mrs. Hilyer's Sec. 10(b) claim but denied her further claim that Hilyer's interest in the three trust funds should be included as a part of his "wages" as defined by Sec. 2 (13), (Pet. App. p. 53a).

The Benefits Review Board affirmed both rulings, and the 10(b) claim has not been further appealed. The Board denied respondent's claim to have Hilyer's trust fund equity included as part of his

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[1]Adopted by the District of Columbia in 36 D.C.C. § 501 (Pet. App. p. 50a).

compensation base, holding that the definition of "wages" in Sec. 2(13) of the LHWCA excluded speculative values.

> "This language [Sec. 2(13)] clearly implies. . .that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage. . . [but] contributions to a pension fund reflects a belief that the employee would also continue to work for employer. . .As for the health and welfare program, this is contingent on an illness occurring. . .As for the training program, there is no indication decedent. . .was going to take advantage of it. . .
>
> "Therefore, it is clear that in this case an employee's right to these funds and the actual value of them to the injured employee is highly speculative. . .employer's contributions to the union pension, health and welfare, and training funds should not be included in a determination of an injured employee's average weekly wage. . ."

and that in any event, to do so would "negate part of the statutory scheme." (Pet. App. pp. 32a-33a)

This holding was then appealed to the United States Court of Appeals for the D.C. Circuit, where Mrs. Hilyer was supported by the Director, Office of Workers' Compensation Programs, who argued for her that in the opinion of the agency, the values of such benefits were determinable and should be included in the death benefit under Sec. 9 of the

LHWCA. The Court of Appeals agreed, holding that while the Board's reading of the "wages" definition in Sec. 2(13) was correct in that the section had been intended to include all identifiable and calculable values, its further ruling on value was wrong. The Court posed the open question as:

> "whether the benefit fund contributions are identifiable, calculable values received by the employees. We hold that they are." (Pet. App. p. 9a)

The Court of Appeals considered "unfounded" the Board's conclusion as to its inability to evaluate the payments (Pet. App. p. 12a), pointing out that Hilyer's interest could be reasonably measured by merely adding to the base rate for each of his salaried hours the 68¢ that the employer had agreed to pay through the union for his services. The Court of Appeals accordingly reversed this "speculative" conclusion by the Board and directed that Hilyer's fund equity be added to his compensation base (*id.* at pp. 13a-14a).

Morrison-Knudsen and its compensation carrier then applied to this Court for a writ of certiorari, claiming that to include such payments in compensation would contravene the words and intent of Sec. 2(13) and would result in imposing an inordinate financial burden on employers and carriers. Petitioners were joined in this view by the Director, OWCP, who reversed the prior position taken by his agency and argues before this Court for the exclusion of these moneys from Hilyer's "average weekly wage".

The application for the writ was granted by this Court on October 4, 1982.

SUMMARY OF ARGUMENT

The facts in the record concern only the manner of calculating a Section 9 death benefit under the LHWCA, *i.e.*, whether or not Hilyer's interest in the three collectively negotiated union funds should be included as a part of his "average weekly wage". Nevertheless, petitioners and their *amici* describe an array of imaginative "fringe benefits", the costs of which are claimed to compel the assessment of increased premium expense to employers. Although none of these claims were made a part of the trial record or included in the briefs on review either before the Benefits Review Board or in the Court of Appeals, they are being asserted before this Court. Lacking any meaningful record reference to them, no response thereto is being made in this brief.

The statute in plain and unambiguous words includes in the definition of "wages" all moneys paid by the employer in "recompense" for the services performed. The three fund payments to which the employer had agreed in its collective bargaining with the union are "wages" and are justly due to the employees and are agreed to be payable "money rates". But even if the contract language were still to be held to be ambiguous, a reading of the definition against the legislative intent of the statute would allow for the inclusion of such payments as a part of contemporaneous wage practices. This is shown to some extent by the legislative history of the statute, but more particularly by the overall

labor pattern which Congress has evidenced by interlinking other pension and medical enactments with the LHWCA. This conclusion is supported by reviewing the federal and state decisions which agree with the view that such moneys are a part of a worker's "wages", that the payments made into union funds are accordingly an important element of his earnings.

On the question of value the percentage of the fund interest here claimed is well below the amount which the widow and the two sons would be required to spend to secure equivalent protection from outside sources. Nor is Hilyer's interest speculative in amount. As the Court of Appeals has held, its value can reasonably be taken as equivalent to the 68¢ per hour which the petitioner-employer had agreed to pay through the union funds for Hilyer's services.

The agency has argued both sides of the question and its present stand is open and is subject to the Court's reading of the statutory language.

In conclusion, this respondent repeats that the wage definition of the LHWCA as now written is well adapted to keep abreast of the changing national concepts of "wages" and meets the current pension, medical and training needs of workers.

ARGUMENT

Statement

In the eight years of continuous litigation which have taken place since Hilyer's death in 1974, no single item of evidence has been proffered by any

party to bear on the truth or falsity of the industry claims which are now being urged on this Court. Up to this point the case has been limited to determining the includibility of contract benefits under the "wages" definition of Sec. 2(13). As petitioners say,

> "At first blush, the decision might appear to be an ordinary and narrow one of statutory construction in which the Court of Appeals simply adopted one of two equally permissible views of what the LHWCA means." (Pet. Bf. p. 6)

Respondent concedes that the described question of statutory construction is properly before the Court on this record. However, the many claims newly made before this Court of catastrophic consequence, as outlined in petitioners' brief and reechoed by the five *amici* organizations of employers and carriers, lack any factual foundation. Their truth has never been tested.

When the record was made before the law judge, it was based on determining Hilyer's "average weekly wage", in other words, whether fund payments made to a union were – for the purposes of calculating his "death benefit" – required to be included under Sec. 9. That question depends in turn on the definition of "wages" given in Sec. 2(13). As limited to that issue, the present industry arguments about potential increases in compensation premiums, as a result of temporary or permanent, partial or total disability claims for a virtually limitless variety of non-contract fringe benefits and the like, are judicially irrelevant. Such arguments should be and have been made to Congress. (S. Rep. 97-498, July 19, 1982, pp. 23-24.)

The claims made in such arguments do not assist in resolving the underlying issues of the statutory consequences of Hilyer's death. In a statute which was intended to transfer the consequences of illness or death to the employer and carrier, claiming the possibility of increased premium cost is hardly a test of statutory meaning.

When the Court of Appeals ruled that Hilyer's interest was "calculable", that Court was saying that his death did not disqualify his claim under the Act. That follows from the fact that he obviously had no further claim to be made under the plans managed by the union, could no longer "vest" a pension, would never again be ill or require yet further training. That did not change the fact that the payments previously made to these funds by his employer remained a substantial part of the contract "remuneration". The question now is whether his death had rendered this existing equity so "speculative" that it would have to be excluded from his statutory death benefit. That involves a subordinate problem of valuation since, unlike a temporarily injured worker, there could be no prospect of his ultimately returning to work.

It was these problem issues which the Court of Appeals resolved on the record, and these alone are considered in this brief.

I.

The Plain and Unambiguous Language of the LWHCA Includes Contract Fund Benefits as a Part of a Worker's "Recompense"

Under the Act, the family of a decedent receives a "death benefit" as measured by his "average weekly wage" (Sec. 9). The definition of the word "wages" is given in Sec. 2(13) of the Act and reads as follows:

"Sec. 2. When used in this Act –

. . . .

"(13) 'Wages' means *the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury,* including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer." [Italics added]

As the statute reads, Sec. 2(13) equates "wages" to the money "recompense"[2] to be paid for the worker's services. If the statutory language is specific, no further search for legislative intent is required, *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981). The rule is given in *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 283 (1980), where it was said

[2]Senate bill 1182 referred to by the Solicitor General (Fed. R. Bf. p. 19, ftn. 17) would, if enacted, revise this word to read "compensated". The difference between the two terms and the reason for the change is obvious.

> ". . . .if 'compelling language' produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language."

And in footnote 27 the Court followed with approval the holding of *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 194 (1978),

> "Once the meaning of an enactment is discerned. . .the judicial process comes to an end."

Of course, there can be instances where the clarity of the language is not all that precise.

> ". . .there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." *U.S.* v. *Turkette*, 451 U.S. 576, 580 (1981).

If we assume that the definition of "wages" in LHWCA remains ambiguous, we give below three tests of the meaning of the word, the common ("ordinary"), the contemporaneous meaning, and whether the word as read is consonant with the purpose of the statute.

(a) The common or ordinary meaning of the word "wages" is best found in the dictionary, a reference which was relied on by the Ninth Circuit when it decided *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d 1336 (Sept. 14, 1982):

> "Webster's Third New International Dictionary (1961). . .states that 'wages' often include 'amounts paid by the employer for insurance, pension, hospitalization, and other benefits.' " (Pet. Supp. Mem. 15a)

That this is the ordinary meaning of "wages" is confirmed by the action of a self-insurer in the Sixth Circuit:

> "Shipowners do not dispute the propriety of an award for fringe benefits."
> *Petition of U.S. Steel Corp.*, 436 F.2d 1256, 1274 (1970)

Another confirmation of this common reading of the word "wages" is shown by the understanding of the Bureau of Labor Statistics,

> "BLS surveyed employer expenditures for employee compensation in private nonfarm industries from 1959 through 1977. Fringe benefits such as employer expenditures for retirement programs, life insurance, health benefit programs, and unemployment benefit programs were included with 'pay for time worked' in the total compensation paid."
> Director's Bf. (Apr. 29, 1982) in *Duncanson-Harrelson Co.* v. *Director, OWCP and Freer*, p. 5, ftn. 3.

(b) The common meaning is also the "contemporaneous" meaning of the word "wage", adaptable to changes made over the years. For this we turn to the Congressional awareness of such changes in labor practices by quoting a part of the foreword to the Employee Retirement Income Security Act ("ERISA", 29 U.S.C. § 1001 *et. seq.*),

> "The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial. . .they have become an impor-

> tant factor affecting the successful development of industrial relations."

To find whether the results of such changes are included, the interpretation of a statute is important to its understanding. One can either read the words in their originally enacted connotation, or preferably in the light of their later development. The latter principle has been accepted by this Court.

> "Old laws apply to changed situations... While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within the scope of the act."
>
> *Browder* v. *United States,* 312 U.S. 335 (1941)

In *Vermilyea-Brown Co.* v. *Connell,* 335 U.S. 377 (1948), *Browder* was cited as a precedent for a contemporaneous reading of the LHWCA and applied to a leased base in Bermuda,

> "...our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers...would have done had they acted at the time of the legislation with the present situation in mind..." (p. 385)

and the Court pointed to the fact that the Fair Labor Standards Act had already been extended to the Bermuda Base.

With regard to the copyright statute, the Court adopted the language of the Sixth Circuit in *Twentieth Century Music Corp.* v. *Aiken,* 442 U.S. 151, 158 (1975), saying,

> ". . .the statute may be applied to new situations not anticipated by Congress if, fairly construed, such situations come within its intent and meaning. . .while statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits. . ."

The same was held to be true as to the patent statutes. In *Diamond* v. *Diehr,* 450 U.S. 175 (1981), a rubber molding process which had been developed by formula and computer was nevertheless held to be patentable since the statute was to be read in the contemporaneous sense:

> "In cases of statutory construction, we begin with the language of the statute. Unless otherwise defined, 'words will be interpreted as taking their ordinary contemporary, common meaning.' " (*Perrin* v. *U.S.,* 444 U.S. 37. . .(1979). . .)

Id., Diamond v. *Chakrabarty,* 447 U.S. 303 (1980); *Barr* v. *United States,* 324 U.S. 83 (1945).

(c) a third way in which statutory terms can be tested is by ascertaining whether the common or contemporaneous meaning furthers the solution to the problem resolved by the statute. From that point of view also, the term "wages" would include trust fund payments. We start with the fact that "wages" are defined in Sec. 2(13) as being the "recompense" of the employee. The question then is whether fund payments are considered to be part of that recompense. The courts have seen it so. Fund payments are regarded as a supplement to direct pay. In fact, it has been said that the principal pur-

pose of bargaining on such funds was to reduce the union's alternative pay demands, *International Association of Machinists and Aerospace Workers, etc.* v. *Garwood Industries,* 368 F.Supp. 357 (D.C. Ohio 1973). For that reason payments have been viewed as "wages" under the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 *et. seq.*

> ". . .this type of wage enhancement or increase, no less than any other, becomes an integral part of the whole wage structure."
>
> *Inland Steel Co.*, v.*N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948).

and such payments are "conditions of employment", *United Brick and Clay Workers of America, AFL-CIO* v. *International Union of District 50, United Mine Workers of America, et al.*, 439 F.2d 311 (8 Cir. 1971), a decision which held:

> "Pensions benefits constitute wages. . . "

To include such payments in "wages" is also found in New York practice — up to the point where narrowed criminal liability might otherwise be extended, *People* v. *Vetri*, 309 N.Y. 401, 131 N.E.2d 568 (1955):

> "To be sure, the term 'wages' broadly interpreted includes all of the benefits, monetary or otherwise, which an employee derives from a master and servant relationship."

Although *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210, 220 (1957), was concerned with the Miller Act and the decision does not purport to deal with a definition of "wages" as such, the Court

nevertheless did note that such fund payments were "sums justly due" to the worker, *i.e.*, formed a part of his "recompense" from the employer. *Carter* noted that the fund payments, as in Hilyer's case, were keyed to the work hours:

> "The relation of the fund contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter." (353 U.S. at 218).

Id., *Trustees of Colorado Corp.* v. *The Pinkard Construction Co.*, 604 P.2d 683 (Colo. 1979).

This is the view that was adopted by the Court of Appeals in this case, by the Ninth Circuit in *Duncanson-Harrelson, supra*, and by the Benefits Review Board in *Minick* v. *Levin Metals Corp.*, BRB No. 80-835 (Apr. 28, 1982). As the decision below points out (Pet. App. p. 10a, ftn. 6), the First Circuit in 1949 had already held that health plans were a part of "wages" for collective bargaining purposes, *W.W. Cross* v. *N.L.R.B.*, 174 F.2d 875, a case cited with approval in *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 159 n. 1 (1971). The question being raised in this case is also pending before the Fifth Circuit in *Waters* v. *Farmers Export Co.*, 14 BRBS 102 (1980), (CA Nos. 81-4258 and 81-4273).

Nor are the federal courts the only fora to so view fund payments. While granting that state compensation decisions can be based on interpreting a variety of statutes, their concept of a worker's "recompense', as expressed in these state rulings,

fully agrees with the above-noted federal decisions as to the inclusive meaning of "wages".

California:

"There is no doubt that payments to a health or welfare fund made as part of the compensation for services rendered by employees are wages. . ."
People v. *Alves,* 320 P.2d 623, 624 (Cal. Sup. Ct. 1957)

"Wages include fringe benefits."
Foremost Dairies, Inc. v. *Industrial Commission,* 41 Cal. Rptr. 173 (D.C.A. 1965)

Colorado:

Such payments are part of the sums justly due the worker.
Trustees of Colorado Corp. v. *The Pinkard Const. Co., supra* at p. 16.

Michigan:

"[W]age or earnings must be deemed to include all items of compensation or advantage agreed upon in a contract for hire which is measurable in money. . ."
Hite v. Evart Products Co., 3[illegible]ich. App. 247, 191 NW.2d 136, 138 (1971).

Missouri:

A "holiday fund" set up by collective bargaining is wages, [and hence subject to garnishment against the employee although in the hands of the union].
Electrical Workers v. *IBEW-NECA Holiday Trust,* 583 SW.2d 154 (Mo. 1979).

Nebraska:

> ". . .we consider. . .employer's contributions to pension funds within the ambit of wages. . ." (478)
> *La Puzza* v. *Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 NW.2d 472 (1974)

Nevada:

> ". . .fringe benefits are a result of [employees'] own efforts, the same as the money he puts in his pocket."
> *Genix Supply Co.* v. *Board of Trustees of Health and Insurance Fund for Carpenters Local Union #971* 438 P.2d 816 (Nev. 1968)

New York:

> "To be sure, the term 'wages' broadly interpreted includes all of the benefits. . .which an employee derives from a master and servant relationship." [liberal interpretation in civil actions, narrow in criminal]
> *People* v. *Vetri, supra* at p. 15.

In short, all known federal and state cases — except the one Arizona case referred to by the Court of Appeals (Pet. App. pp. 10a-11a, ftn. 7) — agree that a worker's "recompense" is not merely his take-home pay but includes these fund equities. The cases confirm that the term "wages" means in ordinary parlance that contract benefits are considered to be a part of an employee's wages. And the view so taken fully coincides with the "common" and "contemporaneous" connotations of the term.

These three may not be the "errorless' tests looked for in *Turkette*, but their concurrence on the meaning of the word "wages" and the fact that they further the purposes of the LHWCA indicate that the statute as written includes Hilyer's equities.

Against this virtually universal concurrence on the meaning of the word "wages", petitioners offer two arguments: first, that *Pepco* and *Embassy* are to the contrary (Pet. Bf. pp. 10, 16-18); second, that the definition of "wages" should be read in a 1927 context (*id*,. p. 17). Petitioners point only to the second portion of the definition (*id*. p. 8) or, as the Federal Respondent correctly says, the non-monetary portion, (Fed. R. Bf. p. 6), which reads,

> "...*including* the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer." [Emphasis added]

Petitioners and the Federal Respondent both assert that this section of the definition is alone applicable and that Morrison-Knudsen's payments into the union funds do not constitute a "similar advantage" within that section (Pet. Bf. pp. 8-9, Fed. R. Bf. p. 6).

On the first point petitioners argue for a "*Pepco* Principle" which is said to compel a denial of Mrs. Hilyer's claim (Pet. Bf. p. 16). The conclusion is in error. This Court in *Pepco*, (*supra,* at p. 10) pointed to the circumscribing injury schedule written into the LHWCA which required the Court to apply the Congressional language. The same type of refusal to engage in judicial invention had been the *ratio decidendi* of the earlier *United States v. Embassy Restaurant, Inc., et al.*, 359 U.S. 29 (1959), where the specific priorities of the Bankruptcy Act excluded

union plan benefits from the wages selected by Congress to be given "priority".

> "We construe the priority section of the Bankruptcy Act, not those statutes."

Although neither case would appear to be a precedent on their facts, there could be said to be a significant indicator of Congressional intention and knowledge in the separation of pay and trust benefits in setting Bankruptcy priorities.

As to petitioners' second argument, the Federal Respondent agrees that Sec. 2(13) is divided into monetary and non-monetary parts (Fed. R. Bf. p. 6) which is a further indicator of the fact that Congress intended to include in "wages", as defined in the LHWCA, every form of worker "recompense".

II

Congressional Intent Shows That Fund Interests Should Be Included In LHWCA "Wages"

The legislative history of the 1972 amendments to the LHWCA lacks clarifying discussion on this point, but as this Court stated in *Director, OWCP* v. *Rasmussen,* 440 U.S. 29 (1979)

> ". . . in 1972 Congress moved to give covered workers added protection."

and the Court previously noted that this expanded protection was one of the three basic Congressional reasons for amending the Act, *N.E. Marine Terminal Co.,* v. *Caputo,* 432 U.S. 249, 261 (1977).

The same conclusion of benefit protection can be arrived at by regarding the legislative pattern of

related pension and labor statutes, as an acceptable form of discerning intent, *Andrus* v. *Allard,* 444 U.S. 151 (1979); *United States* v. *American Trucking Assn.,* 310 U.S. 534 (1940); *United States* v. *Cooper Corp.,* 312 U.S. 600, 606 (1941). Petitioners expect this point to be argued:

> "Moreover, one could argue — as unions and claimants undoubtedly will — that if the decision below makes sense as to the LHWCA, it makes equally good sense as to other statutes such as the Federal Employees Compensation Act, and those acts governing temporary disability insurance, unemployment compensation, Social Security, and state workers' compensation programs, which include language essentially the same as LHWCA." (Pet. Cert. Bf. p. 8)

True. When the statutory scheme is read as a whole, the pattern revealed goes well beyond any merely mechanical application of *ejusdem generis.* It spells out the fact that there does exist an interlinked legislative pattern which is intended to insure the employee's receipt of his pension and welfare rights and to see that these benefits are made a part of his "recompense". The statutes referred to are as follows:

Davis-Bacon Act of 1931, 40 U.S.C. § 276, 46 Stat. 1494

> As petitioners note, this statute was amended in 1964 to include contract benefits (Pet. Bf. pp. 12, 30), a clear showing that Congress regarded such benefits as

being a part of the recompense of the employee.

Miller Act, 40 U.S.C. §§ 270 a-d

As held by this Court in *Carter*, the Congressional intent in this Act was to include all contract benefits as a part of the sums "justly due" to the employee. This case was a principal referrent of the Court of Appeals (Pet. App., p. 11a).

Social Security Act, 42 U.S.C. § 1107, 49 Stat. 642

As noted, petitioners say the wages reference of this statute is similar to that of the LHWCA. Contract benefits paid to an employee are to be counted as a part of a person's retirement income (Sec. 907), *Inland Steel, supra.*

Employee Retirement Income Security Act, ("ERISA") 88 Stat. 832, as am. by the *Multiemployer Pension Plan Amendments Act of 1980,* P.L. 96-364, 96th Cong., esp. 29 U.S.C. §1001 *et seq.*

"It is. . . the policy of this Act to protect. . .the interests of participants in private pension plans and their beneficiaries."

Contract benefits are a part of the employee's income *Alessi* v. *Raybestos Manhattan, Inc.,* ____ U.S.____, 101 Sup. Ct. 1895 (1982).

National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 *et seq.* am. by the *Labor-Management Relations Act,* 61 Stat. 136, 29 U.S.C. §141 *et seq.*

As this Court, the National Labor Relations Board, and many others have pointed out, contract benefits are a part of the wages of an employee and must accordingly be included in collective bargaining. As noted above, the Seventh Circuit in *Inland* had held:

> "...this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure..."

and constituted a "condition of employment" under the statutory phrase.

The importance of this Act in ascertaining Congressional intent is twofold, the inclusion of plan benefits as an integral part of wages and conditions of employment, and the direct tie-in with the LHWCA (Sec. 17(b)) raising an obligation to refund fund payments to the union when received as a part of the compensation payable under the Act, a provision similar in purpose to the following.

Federal Employees Compensation Act, 5 U.S.C. § 751 et seq.

This Act covers federal employees regarding their pay and "other benefits". As said in *United States* v. *Crystal*, 39 F.Supp. 221 (N.D.Ohio 1941), this language covers

> "...everything that the government has paid out, not only what the employee received.

> . . .the money allowance payable to an employee or his dependants and any other benefits paid for out of the compensation fund."

And, as in the LHWCA (see above) when plan benefits have been received, here from the union, there from the government, they must be refunded out of the compensation received (5 U.S.C. § 790). While a difference of language occurs between the FECA and the LHWCA, our question is whether they differ in significant purpose, i.e., whether the two taken together evidence a Congressional intent to provide the same types of remuneration for both public and private workers. The statutes suggest that this is so. In an otherwise remarkable coincidence, Sec. 7b of the LHWCA and 5 U.S.C. § 790 of the FECA each provide that when plan benefits have previously been received, they must be refunded to the union or government respectively *out of the compensation the worker receives* — which can only be read as meaning that Congress intended that the compensation to be paid in either case should include these fund benefits!

The pattern which is shown by this statutory scheme indicates not only that Congress has for many years been fully aware of the increasing use of union plans to benefit members and their families, but has enacted a series of statutes to protect the receipt of benefits by workers and their

families to insure that they would receive such moneys, and that the benefits payable under a plan would go to employees, not to the union or be returned to the employer.

Such an intent is clearly demonstrated by Title 26 where the employer avoids tax on his payments by making them to a "qualified [union] trust" under Sec. 401(a)(h)(i), and the employee is not taxed currently but only on receipt (Sec. 402 a 1), in effect a form of "deferred payment", (Note, 66 Yale L.J. 449, 458, 460), — *and the accrued rights in the "plan" cannot be forfeited by death (Sec. 411(a)3(A)).*

What argument do petitioners advance to the contrary? Essentially, that Congress' failure to revise Sec. 2(13) in 1972 was a purposive "omission",

> "Union fund contributions such as employer payments to pension plans are nowhere mentioned in the text or legislative history because they are nowhere in existence. . ." (Pet. Bf. p.22).

This argument is then supported *inter alia* by citing the adverse Congressional committee testimony given by various industry spokesmen (Pet. Bf. p. 27, ftns. 32-36). Yet the reason for the absence of change appears to be patent in the existing scope of the definition.

Petitioners' omission argument says

> ". . .it is so crucially significant that. . . no one ever suggested that the 'wages' payable under the Act did or ought to reflect an employer's pension or welfare fund contributions." (*Id.* 26).

This approach carries little weight. First, in logical parlance the argument is a circular one, *i.e.*, "if the statutory definition is inadequate, a change was required and therefore the omission of any change shows that the statutory definition was inadequate.

The same oversight or omission argument has been made before and has been uniformly rejected. In the *Inland Steel* case, *supra*, the Seventh Circuit pointed out that an argument that contract benefits were not negotiable under the NLRA because not specifically mentioned in the statute was meaningless since the same could be said as to "myriad matters" which also were not specifically mentioned. In *Director, OWCP* v. *Rasmussen*, 440 U.S. 29 (1979), the Director argued that Congress in drafting the 1972 revisions to LHWCA must have "overlooked" the desirability of putting a ceiling on death benefits, an argument rejected by this Court which noted that the legislative history of the LHWCA fully demonstrated the existence of a statutory intent to eliminate such a ceiling in death cases. In a third instance, the same omission argument was made and rejected in *Potomac Electric Power Co.* v. *Director, OWCP, supra*, at p. 10, on the ground that the claim of Congressional oversight in retaining the unambiguous injury schedules of the LHWCA could not be assumed, that the Court's responsibility was to enforce the language as drafted.

In the words used, Sec. 2(13) appears to be completely adequate to include every part of a worker's "recompense", whether monetary or not, whether paid directly to the employee or indirectly through the union. As such, there was no legislative reason

for any change. In fact, the very absence of any change by a percipient Congress which had detailed experience with pension plans is in and of itself an indication that such plans were already included within the existing language.

III

The Amount of the Employer's Fund Payment Is One Way to Measure the Value of Hilyer's Plan Equities

The Court of Appeals held:

> ". . .we think that the above quotation from the *Carter* case supports the conclusion that the most reasonable course is to measure the value of the fringe benefits by the amount of the employer's contributions to the benefit funds."

This conclusion becomes even more reasonable when it is considered that not only has there been no windfall to Mrs. Hilyer, but an increased expense. She not only lost the value of Hilyer's potential to "vest" a pension, but lost the high economic value of the group medical insurance under which he and his family were covered. Finally, in order to look for work, Mrs. Hilyer must now be retrained. To secure all of these from private sources would obviously cost her more than the percentage of the 68¢ an hour which might be added to Hilyer's death benefit. Her loss was taken note of by the Benefits Review Board:

> "Further, the amounts contributed by employer would in all likelihood not buy decedent's family similar kinds of protection." (Pet. App. p. 33a)

The Court of Appeals agreed, quoting with approval from *Hite:*

> "However, the *facts* are that at the time of the injury her employer was putting aside this potential benefit for her and that the injury prevented a continuation of this potential toward a vested interest. As a result of her injury she must find some other way of providing income for retirement."

adding as to training,

> "As for career training, that too is something the employee would have to spend his or her money to acquire. It is therefore as much an economic advantage as are the insurance policies and the pension." (Pet. App. pp. 10a-11a)

Or, as the Court quoted from the language of *W. W. Cross* v. *N.L.R.B., supra,*

> ". . . such a program provides a financial cushion. . . at less cost than such a cushion could be obtained through contracts of insurance negotiated individually."

Hilyer's present fund interest could, of course, be calculated precisely by actuaries. However, that would be a difficult and complex computation for which it would be necessary to use the fund records and membership books of the union. More practical-

ly, the values involved are reasonably well approximated by simply using the employer's hourly payments as a measure, since that is what Morrison-Knudsen had agreed to in the first place and deducted from its taxes. Assuming that the interest on the fund is offset against its administrative expenses, the payments made are still about the same amount as remained in the funds for Hilyer's ultimate benefit. Accordingly, this latter means of evaluation would appear to be quite reasonable as a measure of his portion of his earnings.

As the Court below has held, Hilyer's interest is a calculable one and not "highly speculative". Petitioners' argument that Mrs. Hilyer lost nothing by her husband's death (Pet. Bf. p. 15) seems clearly in error.

IV

The Current Agency Interpretation of the Definition of "Wages" Is Not Entitled to Special Deference

It is reiterated in the briefs of petitioners and others that

> "The Department of Labor, the federal agency charged with the administration of the LHWCA, has consistently construed the definition of "wages" to exclude an employer's trust fund contributions. This long-standing construction of the Act by its enforcing agency is entitled to considerable weight before this Court." (Pet. Bf. p. 7)

The trouble here is that there has never been such a construction and there are no agency regulations on the point. The reference given for this statement (Pet. Bf. pp. 32-33) is a 1968 memorandum (set out in full as Appx. A to Cert. Bf. of the American Insurance Association) quoting the opinion of an Assistant Solicitor:

> "In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. *Since* we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices." (at pp. 3a-4a, italics added)

But the Department of Labor did not follow this waiting recommendation. The first known claim for the inclusion of benefits in wages arose in *Collins* v. *Todd Shipyards Corp.*, 5 BRBS 334, (1977), only three months before *Hilyer* was also decided by the Board. While the Department of Labor made no presentation in *Collins,* it filed a brief before the Board in *Hilyer* to the effect that if his fund interests could be shown to have "economic value", they should be included in his wages under the LHWCA. When called on by the Court of Appeals in early 1981 to state the agency opinion in court, the Department argued that Morrison-Knudsen's payments to the funds managed by Hilyer's union

should be included in his death benefit. Shortly thereafter a Department spokesman then appeared before the Ninth Circuit in *Duncanson-Harrelson* and again stated that a union pension fund interest was to be included as a part of the decedent's "wages" under the Act. When the writer of the Board's opinion in *Hilyer* became the Director of the Office of Workers' Compensation Programs, the Ninth Circuit was asked to reverse that prior statement and withhold any final decision. The request was refused. Since that time the Director has joined with petitioners in this case, although still named as a respondent.

This Court has held that the Benefits Review Board is not a "policy-making agency" and

> ". . . its interpretation of the LHWCA thus is not entitled to any special deference from the courts,"
>
> *Potomac Electric Power Co.* v. *Director, OWCP, supra,* at p. 10, (ftn. 18, p. 278)

On the other hand, an authoritative administrative construction should be given deference, *U.S.* v. *Rutherford,* 442 U.S. 544, 553 (1979), but only so long as it is reasonably derived from a statute's terms, *United States* v. *Plesha,* 352 U.S. 202 (1957); *United States* v. *Turkette,* 452 U.S. 576, 580 (1981); *F.C.C.* v. *WNCN Listeners Guild,* 450 U.S. 582 (1981).

Here the agency position is not clear. The first statement made in court by the Department of Labor was only a year ago, at which time both the District of Columbia and Ninth Circuits were told

that, in the view of the Director, fund interests such as Hilyer's were includible in death benefits under the LHWCA "wages" definition. Now the Department takes the contrary position.

It has to be admitted that an agency can reverse its view of the meaning of a statutory term, but the deference to be given to their opinion by the courts is put in question and makes it more essential to determine judicially whether the statutory term is all that ambiguous. Here, as we have pointed out above, the words used appear to support the earlier position taken by the Department and are confirmed by the common and contemporaneous meaning given to the words by the Bureau of Labor Statistics (*supra*, p. 12).

It is suggested that the contrary positions taken by the Director in 1981 and today render questionable the deference normally due to an agency interpretation.

CONCLUSION

Methods of wage determination by collective bargaining have admittedly changed in the last fifty years, primarily in the direction of emphasizing the ever-increasing economic importance of meeting the pension and medical requirements of the individual. The definition of "wages" now found in Sec. 2(13) of the LHWCA, when limited – as in this case – to the employer-supported union fund interests which have been arrived at by the process of collective bargaining, is flexible enough to incorporate such advances in industrial wage practices. These funds provide what the Board and the Court

of Appeals today have seen as essential economic values.

Nor does Hilyer's death make such values too speculative to be included in a death benefit under Sec. 9 of the Act, even absent any need to depend on the many decisions which call for a "liberal interpretation" of the Act, *e.g., Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

The ruling of the Court below should be affirmed.

Respectfully submitted,

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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
and
ARGONAUT INSURANCE COMPANY,
Petitioners,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENT HILYER'S BRIEF FAILS TO DEAL WITH TWO OF PETITIONERS' MAIN ARGUMENTS: THE DEVASTATING PRACTICAL IMPACT OF THE DECISION BELOW, AND THE LEGISLATIVE HISTORY IN THE LIGHT OF THE *Pepco* Rule

The issue in this case is whether employer contributions to union trust funds are included in employee "wages" within the meaning of the LHWCA. The parties are agreed that this issue is solely a matter of congressional intent. But the remarkable thing about respondent Hilyer's brief is that it completely fails to consider two of

petitioners' principal guides to that intent: the purposes the statute was intended to serve, and the legislative history. It expressly refuses to discuss one, and it attempts no real answer to the other.

A. The Practical Consequences of the Decision Below in Undermining the Statute's Purposes

Among the practical effects of the decision below demonstrated in petitioners' brief are that longshoremen's benefits would rise above wages (Pet. Br. at 42-43),[1] compensation premiums would rise above payroll (Pet. Br. at 36-44), and swift, efficient delivery of benefits would become impossible. Pet. Br. at 46-48. In the *amicus curiae* briefs, the practical consequences argument is the dominant theme: on the shipbuilding industry, "catastrophic" (Ship. Br. at iv) and as to administration, "chaotic" and "virtually impossible" (*id.* at 8); on the stevedoring industry, "disastrous," with "employers * * * forced into bankruptcy" (Steve. Br. at 11); on self-insurers' members, "intolerable hardship" (Self-Insurer's Br. at 25); on insurers and the economy, "distastrous." AIA Br. at 1. Respondent has offered three reasons for refusing to deal with these consequences.

Respondent's first contention is that these consequences are "judicially irrelevant." Hilyer Br. at 8. But far from being irrelevant, judicial consideration of the practical effects of a statutory interpretation is a wholly legitimate, commonly used tool of statutory analysis, applied to the LHWCA and other statutes alike. This Court has repeatedly declared that it must take cognizance of how a particular interpretation will be applied in other cases, and that it considers pertinent whether the practical

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[1] Throughout this Reply Brief we use the same abbreviations as in our Opening Brief, as well as the following: "Hilyer Br." (Brief of Respondent Hilyer); "U.S. Br." (Brief for the Federal Respondent on the Merits); "Pet. Br." (Petitioners' Opening Brief); "Self-Insurers' Br." (Brief of *Amicus Curiae* National Council of Self-Insurers on the Merits in Support of Petitioners).

consequences of a particular construction will advance or undermine a statute's purposes.[2]

To be sure, this Court has also sometimes held that, when statutory language is so clear as to be absolutely inescapable, unpleasant effects such as added costs are not enough to overcome the necessity for respecting that clear language. But the present case is about as far from that situation as it would be possible to get. If the Longshoremen's Act meaning of "wages" urged by respondent is as plain as she contends, how could it have happened that this meaning eluded the tens of thousands of judges, administrators, lawyers, employers, and claimants who have disposed of millions of cases over the past fifty-five years on the basis of a flatly opposite meaning?[3] More-

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[2] *See, e.g., Pillsbury Co.* v. *Conboy*, 51 U.S.L.W. 4061, 4063-65 (U.S. Jan. 11, 1983); *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 85-86 (1980); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 268-271 (1979); *Andrus* v. *Charleston Stone Products Co.*, 436 U.S. 604, 614-616 (1978); *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978); *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 110-111 (1944).

[3] One may well ask how respondent could achieve this upside-down view of the "plain meaning" of the statute. One device is to change the words of the statute. The definition begins, " 'Wages' means the money rate at which the service rendered is recompensed * * *." Obviously the operative word here is "money rate," which is the number of dollars and cents per hour or month or year received by the employee — and it is on this figure that the vast bulk of cases are now disposed of without controversy. Equally obvious, "money rate" cannot by any amount of stretching include employer contributions into union trust funds. To avoid this difficulty, respondent reaches for the verb "recompense," and then proceeds to argue that "recompense" is broad enough to include these contributions. Hilyer Br. at iii, 10, 20, 21, 26. The word "recompense" is the word chosen in the very heading for respondent's Argument I on plain language, and is the last word in that section. But "recompensed" is only a neutral verb in the definition—it could just as well have been "compensated" (which has the same root), or "paid," or "remunerated," or any number of other synonyms. Respondent rewrites the definition to say, in effect,

over, the consequence here is not merely an unwelcome added cost, but the frustration of the Act itself, by putting a premium on remaining away from work; by sabotaging one of the prime purposes of the Act — rehabilitation; by making compensation uninsurable; and by substituting uncertainty, long delay, and litigation for prompt delivery of benefits.

Respondent's second reason for refusing to discuss "practical consequences" appears to be the notion that the plans on which petitioners' calculations of impact are based are not comparable to the plans here involved, but are "a virtually unlimited variety of non-contract fringe benefits and the like * * *." Hilyer Br. at 8. Of course, no two health and welfare "packages" are identical, but the Atlantic and Gulf agreement used as an example (Pet.

"'wages' means the recompense. . . ." Having achieved this, respondent then apparently feels no need to rely on the second half of the definition, "board, rent, housing, lodging or similar advantage received from the employer . . . ." Indeed, respondent almost seems to chide petitioners for even discussing this second "nonmonetary portion" of the definition. Hilyer Br. at 19.

The other textual revision undertaken by respondent is to change the words "received from," in the excerpt just quoted, to "paid by the employer." Hilyer Br. at 6. Indeed, at one point respondent changes "received" to "paid" in the space of five lines. Hilyer Br. at 10. This is not an inconsequential change. What a beneficiary received from a union trust fund is "received from" the trust fund. The fact that ultimately the fund has been created by employer contributions does not change this, since what the employee receives often bears little or no relation to those contributions. Hilyer himself, for example, had acquired no pension rights, because of the brevity of his employment, while employees with five years' seniority get pension credits for years in which no contributions had been made based on their wages. JA at 50-51; U.S. Br. at 12.

Note, moreover, that when Congress wanted to make an exception in the definition of "wages" to the "received-from-the-employer" rule, as it did in order to cover tips, it did so by adding an express provision at the end of the definition. It is a fair implication, then, that this is the only exception Congress intended to carve out of the "received-from-the-employer" requirement.

Br. at 42-43), like the funds here involved, is basically a "pension and welfare" fund, and is so referred to by the Stevedores (Steve. Br. at 11), and in the agreement itself. JA 38. Note also that the Health and Welfare Fund in the instant case was extremely inclusive. It covered:

> "medical, dental, and/or hospital care, compensation for injuries, and/or illness resulting from occupational activity, * * * unemployment benefits, * * * purchase of insurance covering life and accidental death, accident disability benefits, hospitalization, surgical, medical and sickness benefits, * * * or any other type of health and welfare benefits * * * in the discretion of the trustees * * *." [JA 38.]

For good measure, the present package included a "training fund,"[4] going beyond most of the longshoremen's plans used in our comparisons.

Thus, the *additional* types of fringe benefits cited by petitioners as being potentially included (Pet. Br. at 44) were not involved in, and are not necessary to, petitioners' demonstration of the devastating impact of the decision below. But they are still intensely relevant. The reason is that if the erroneous formula of the court below stands — "*all* of the identifiable value, in whatever form

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[4] The training fund was not, however, as broad in coverage as Hilyer's brief seems to contend. Notwithstanding her admission that the training fund "did not in words specify that it was earmarked for the families of members" (Hilyer Br. at 3; *see* JA 40), Mrs. Hilyer appears to argue that the fund was in fact so designed, and hence that she must now purchase training that she otherwise would have obtained from the fund. Hilyer Br. at 27. This is simply not so. The explicit terms of the collective bargaining agreement state that the training fund was designed to ensure that adequate, trained manpower would be available for the construction work to be performed under the agreement's terms; the training fund guaranteed workers' families no benefits whatsoever. In fact, the fund is best viewed as an employer's investment in his entire workforce, rather than in individual employees, with contributions measured on a per-employee basis for convenience. *See* U.S. Br. at 13 n.10.

it may appear" (Pet. App. 13a; emphasis in original)—attempts will certainly be made to add these fringe items and others to wage calculations, severely complicating and delaying the benefit process. Moreover, if that formula is applied literally, most of them might eventually have to be actually included, thus exacerbating the already damaging effect of the decision.

Finally, Hilyer incorrectly suggests that this Court should ignore the practical effects of the decision below simply because direct factual evidence of those effects was not introduced at the original administrative hearing. But neither Hilyer nor anyone else has challenged our contention that the decision below will sabotage the Act's purposes; nor has Hilyer or anyone else challenged the accuracy of the matters that we, the United States, and *amici* have referenced.[5] These matters are in the public record and all are the type the Court has regularly taken note of and relied upon in other cases.[6]

B. Legislative History in the Light of the *Pepco* Rule

The "*Pepco* rule" may be summarized as follows: when Congress takes over intact a provision from a state act and enacts it into federal law, and when *at that time* the

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[5] Those in the best position to challenge petitioners' and *amici*'s representations have not come forward to do so. Although the Metropolitan Washington Council, AFL-CIO, filed a brief in opposition to the petition, it has filed no brief in support of Hilyer on the merits. It is also noteworthy that neither the International Longshoremen's Association nor any other longshoremen's association or union has filed an *amicus* brief in support of respondent.

[6] *See, e.g., Memphis Bank & Trust Co.* v. *Garner*, 51 U.S.L.W. 4104, 4105 n.8 (U.S. Jan. 24, 1983) (figures in United States *amicus* brief); *Bowen* v. *United States Postal Service*, 51 U.S.L.W. 4051, 4057 n.4 (U.S. Jan. 11, 1983) (White, J., concurring and dissenting) (administrative agency's statistics). *See also Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 246-47 (1978) (retroactive non-funded liability for pension plans "jeopardizes the insurer's solvency and, ultimately, the insureds' benefits"); *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 721-723 (1978) (same).

provision had a clearly-accepted meaning, Congress must be deemed to have intended that meaning. *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268, 280 (1980); Pet. Br. at 16-17 & n.14.

Although this principle is said in petitioners' brief to control this case (Pet. Br. at 16), Hilyer's brief makes no attempt to deal with it. Having noted that petitioners argue that the *Pepco* case compels a denial of Hilyer's claim, the Hilyer brief simply states: "The conclusion is in error." Hilyer Br. at 19. There follows a sentence that merely summarizes the case's holding, and then the brief moves on to other matters.

At another point in the brief, Hilyer announces her own rule of interpretation, which is the exact opposite of the *Pepco* rule. Hilyer contends that, in construing the meaning of "wages" in the LHWCA, "[o]ne can either read the words in their originally enacted connotation, *or preferably in the light of their later development.*" Hilyer Br. at 13; emphasis supplied. Then, after noting that in recent years the term "wages" has in some contexts come to include benefits such as employer trust-fund contributions, Hilyer contends that "[t]he definition of 'wages' now found in * * * the LHWCA * * * is flexible enough to incorporate * * * advances in industrial wage practices." *Id.* at 32. This approach is completely at odds with this Court's settled principles of statutory construction.

It is well established that "a statute 'is not an empty vessel into which the Supreme Court is free to pour a vintage that [the Court] think[s] better suits present-day tastes.'" *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 827 (1978) (quoting *United States* v. *Sisson*, 399 U.S. 267, 297 (1970)). Rather, as this Court has repeatedly held, words of a statute are to be "interpreted as taking their ordinary, contemporary, common meaning * * * *at the time Congress enacted the*

statute * * *." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (emphasis supplied); *accord*, *Pepco*, 449 U.S. at 280 ("Our task is to ascertain the congressional intent underlying the schedule benefit provisions enacted in 1927 [the year the LHWCA was adopted]; we are not free to incorporate into those provisions subsequent * * * developments that we may consider sound as a matter of policy").[7] Hence, Hilyer's reliance on recent developments in "industrial wage practices" (*see* Hilyer Br. at 12-20; 32) cannot retroactively give meaning to the term "wages" as it was adopted by Congress in 1927. This is particularly true when Congress adopted verbatim the language of a state act which had at the time a universally accepted meaning.

While Hilyer argues (Hilyer Br. at 20) that "Congressional intent shows that fund interests should be included in LHWCA 'wages,'" her entire argument concerning the congressional intent behind *this* statute is premised upon the congressional intent behind *other* statutes. *Hilyer has not cited one syllable in the legislative history of the LHWCA to support her interpretation.*

Thus, Hilyer relies heavily (Hilyer Br. at 15, 16, 28) upon two circuit court decisions[8] interpreting the term "wages" in the federal labor laws as support for her interpretation of that term in the LHWCA. But this Court has already twice rejected the application of those decisions to other statutes. *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959) ("Nor do we believe that holdings that various fringe benefits are

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[7] *Cf. Director* v. *Perini North River Ass'n*, 51 U.S.L.W. 4074, 4079 (U.S. Jan. 11, 1983) (construction of the LHWCA must take into account "the context in which the [1927 Act was] passed").

[8] *Inland Steel Co.* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied on this issue*, 336 U.S. 960 (1949), *aff'd on other grounds sub nom. Steelworkers* v. *NLRB*, 339 U.S. 382 (1950); *W.W. Cross & Co.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949).

wages under the N.L.R.A. or the Social Security Act are apposite. We construe the priority section of the Bankruptcy Act, not those statutes") (distinguishing *Inland Steel*); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-593 n.16 (1977) ("Even if pensions are 'wages' for the purposes of the NLRA, that classification would not control their treatment under the very different statute at issue in this case") (citing *Embassy Restaurant* and distinguishing *Inland Steel*).

Similarly, Hilyer argues that Congress' amendment of the Davis-Bacon Act in 1964 and its enactment of certain other statutes concerning employee trust plans should be treated as evidence of a parallel congressional intent to amend the LHWCA. This is an extraordinary contention. It asks this Court to up-end the established principle that Congress knows how to legislate with particularity (*see, e.g., American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 510-512 (1981)), and hold, instead, that to amend one statute is to amend them all. Moreover, Hilyer's argument ignores one enormous difference between Davis-Bacon and the LHWCA which affects the calculation of benefits under the two quite different statutes: under Davis-Bacon, a collective wage level is fixed for an entire area; but under the LHWCA, an individual wage must be calculated for *each* of the millions of workers who will file compensation claims. Congress should surely not be thought to have imposed such a significant new LHWCA administrative burden, sub silentio, through its enactment of Davis-Bacon.

We urge the Court to reject the view that congressional intent concerning the LHWCA can be determined on the basis of the background and legislative history of other statutes. Instead, if the Court bases its determination on the legislative history that matters—that of the LHWCA itself—it will conclude that Congress never intended or even contemplated the inclusion of trust-fund benefits in LHWCA "wages." *See* Pet. Br. at 19-31.

II. THE STATE CASES CITED BY RESPONDENT ARE IRRELEVANT TO THE LHWCA AND, IN ANY EVENT, DO NOT SUPPORT RESPONDENT'S POSITION

As support for her construction of the word "wages" in the LHWCA, respondent has cited several state decisions interpreting other statutes. Hilyer Br. at 15, 17-18. However, as this Court has already ruled, the term "wages" in the LHWCA must be construed in light of the specific purpose and legislative history of the LHWCA itself. *See Pepco*, 449 U.S. at 280. Respondent's reliance upon state court decisions interpreting various state statutes is therefore misplaced. Moreover, Hilyer has in any event misconstrued those state court decisions.

Most of the state cases cited by Hilyer did not even deal with the definition of "wages" in a state workers' compensation act. Thus, in *Electrical Workers* v. *IBEW-NECA Holiday Trust Fund*, 583 S.W.2d 154 (Mo. 1979), the issue was whether, under the terms of a particular collective bargaining agreement, interests in a vacation pay trust fund were subject to garnishment. 583 S.W.2d at 157. (Petitioners have already noted that vacation pay is a legitimate inclusion in LHWCA "wages," *see* Pet. Br. at 8 n.6.) The issue in *LaPuzza* v. *Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 N.W.2d 472 (1974) was whether a contractor's payments for social security, unemployment insurance, health and welfare insurance, and pension funds were part of "the cost of all labor, materials, and equipment * * *" for which he was entitled to be repaid under a construction contract. 217 N.W.2d at 475. In *Genix Supply Co.* v. *Board of Trustees of Health & Ins. Fund*, 84 Nev. 246, 438 P.2d 816 (1968), the court held that a contractor was liable under its surety bonds for amounts it had failed to contribute to employee pension, health, and welfare plans, under a state statute giving priority in such circumstances to a recovery for wages. 438 P.2d at 816-817. The court noted that this Court had ruled to the contrary in *Embassy*

Restaurant, but declined to apply that decision to the state law at issue. *Id.* at 817.

Equally inapplicable is the decision in *People* v. *Alves*, 155 Cal. App. 2d Supp. 870, 320 P.2d 623 (1957). In that case, a criminal prosecution, the issue was whether an employer could be imprisoned for failing to make required contributions to employee health and welfare funds. 320 P.2d at 624. In concluding that these contributions were "wages" under the state labor code, the court relied upon a state statute defining "wages" as "*all* amounts for labor performed by employees of *every* description * * *." *Id.* at 624-625; emphasis added. *Foremost Dairies* v. *Industrial Accident Comm'n*, 237 Cal. App. 2d Supp. 560, 47 Cal. Rptr. 173 (1965) simply relied upon *Alves* (47 Cal. Rptr. at 186-187) to hold an employer liable under an employment agreement for certain employee medical expenses.

The statute at issue in *Trustees of Colorado Corp.* v. *Pinkard Constr. Co.*, 199 Colo. 35, 604 P.2d 683 (1979) made subcontractors liable for "amounts lawfully due" workmen. 604 P.2d at 684. Relying upon this Court's decision in *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957), the court held that an employer's pension plan contributions were covered by the statute. 604 P.2d at 684. Finally, the New York Court of Appeals in *People* v. *Vetri*, 309 N.Y. 401, 131 N.E.2d 568 (1955) ruled that an employee's vacation pay was *not* part of his "wages" under a state law requiring prompt payment of wages to employees. 131 N.E.2d at 570-572.

The *only decision* cited by Hilyer holding that an employer's trust fund contributions were "wages" for the purpose of determining workers' compensation is *Hite* v. *Evart Products Co.*, 34 Mich. App. 247, 191 N.W.2d 136 (1971). But even that decision is of questionable value, since, prior to the *Hite* court's decision, the state legisla-

ture adopted a provision specifically excluding fringe benefits from a compensation award. 191 N.W.2d at 138 n.2. Indeed, subsequent to the *Hite* decision, the Arizona Court of Appeals in *Still* v. *Industrial Comm'n*, 27 Ariz. App. 142, 551 P.2d 591 (1976) expressly refused to follow *Hite* for that very reason ("*no jurisdiction* now authorizes what Still seeks this Court to provide"), and because the logic of *Hite* would require "social security contributions, unemployment compensation premiums, and maybe even workmen's compensation premiums" also to be added. 551 P.2d at 593-594; emphasis supplied.

Thus, the most that can be said for these state cases is that, based upon different state law provisions—none of which even resembled the LHWCA definition of "wages" —different state courts reached different results concerning the inclusion of trust fund contributions in benefits due employees. Only one decision (*Hite*) even addressed "wages" in a workers' compensation context, and it is plainly lacking in precedential value. Therefore, in this case there is not even the "recent trend" which this Court considered and rejected in *Pepco*, 449 U.S. at 279-280. Accordingly, the state court decisions cited by Hilyer are inapposite to this case.

CONCLUSION

For the foregoing reasons and the reasons stated in petitioners' opening brief, the judgment of the United States Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
and
ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
and
SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE
and
BRIEF OF AMICI CURIAE
ALLIANCE OF AMERICAN INSURERS
and
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

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For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE ALLIANCE OF AMERICAN INSURERS and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Pursuant to Rule 36, United States Supreme Court Rules, the Alliance of American Insurers and the National Association of Independent Insurers seek leave to file a brief supporting Petitioners and demonstrating that contributions to pension/health and welfare funds are not "wages" within the meaning of Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(13). Consent of counsel for Petitioners has been received. Consent of Respondent Hilyer has been refused. Movants' brief in support of the Petition was accepted by order of this Court dated October 4, 1982.

Movant Alliance of American Insurers is a trade association of 150 property and casualty insurance companies incorporated under the Illinois Not-For-

Profit Corporation Act. Movant National Association of Independent Insurers is a trade association of over 500 property and casualty insurance companies. Movants' members companies range from the very large to the relatively small and are engaged in the workers' compensation insurance business in all fifty states and the District of Columbia. According to most recent figures, movants' member companies underwrite approximately 45% of this nation's workers' compensation risks and provide about 36% of the compensation insurance required by employers subject to the District of Columbia Workmen's Compensation Act, 36 D.C. Code, §§ 501 et seq.

Movants offer a perspective on the issues not shared by any party. Movants' members participated in and supported the 1972 reforms to the LHWCA benefit structure.

Movants' brief demonstrates that the Court of Appeals' interpretation of Section 2(13) is unlike any definition used in that legislative process or at any time during the LHWCA's 55-year history.

Movants' members work with the LHWCA's provisions and administrators on a daily basis. Movants' brief demonstrates that that Court of Appeals' expansive definition of "wages" will provide most workers with a disability income exceeding the pay taken home from productive employment and will vastly increase the incidence of exaggeration and malingering. Movants' brief also demonstrates that retroactive application of the decision below will force the reopening of hundreds of thousands of cases "closed" by Deputy Commissioners since 1972 and cause the collapse of the LHWCA's administrative framework.

Movants' perspective and discussion of the impact of the decision on the costs and administration of thousands of claims will assist this Court in evaluating the merits of the decision below and assessing the need for reversal. This Motion for Leave to File the accompanying Brief should be granted.

DATED: November 17, 1982

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BRIEF OF AMICI CURIAE ALLIANCE OF AMERICAN INSURERS and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

SUMMARY OF ARGUMENT

The conclusion that Mr. Hilyer's "wages" should include the amounts which

Morrison-Knudsen contributed to the various union trust funds suffers from three basic flaws:

(1) The conclusion ignores persuasive evidence that Congress' reform of the Act's benefit structure in 1972--a reform which increased maximum weekly benefits from $70 to 200% of the national average weekly wage (now $524.70)--was premised on the understanding that "wages" should not include amounts paid by an employer to fund collectively bargained-for pension/health and welfare plans.

(2) The conclusion is bad public policy because it raises compensation benefits to a level exceeding "take home" pay and removes all economic incentive to resume work in most cases.

(3) If applied retroactively, the conclusion will force recalculation of benefits payable to hundreds of thousands of claimants and will cause the Act's administrative framework to collapse, thereby preventing achievement of the Act's primary purpose: The speedy delivery of fair compensation benefits for employment-related injury and disease.

Whether measured against the definition of "wages" used by all parties to the 1972 amendments, traditional concepts of workers' compensation, or the practical demands of effective administration, the decision is wrong. It should be reversed.

ARGUMENT

I.

THE DECISION BELOW DISREGARDS THE INTENT AND HISTORY OF THE 1972 AMENDMENTS AND THE FACT THAT THE MASSIVE BENEFIT INCREASES MADE IN THAT YEAR WERE BASED UPON THE PREMISE THAT "WAGES" DO NOT INCLUDE CONTRIBUTIONS TO PENSION/HEALTH AND WELFARE FUNDS

Hundreds of millions of dollars have been paid to hundreds of thousands of workers since the LHWCA's benefit structure was reformed in 1972. These monies were paid on the basic premise--shared by all throughout the LHWCA's history--that the "wages" on which the proper rate of compensation depends do not include employer contributions to pension/health and welfare funds.

Pension/health and welfare funds were basically unknown when the Act's definition of "wages" was adopted in 1927. However, the increasing frequency and

significance of a variety of "fringe benefit" programs caused the 88th Congress to broaden the Davis-Bacon Act's definition of "wages" to specifically include contributions made to fund a broad range of "fringe benefit" programs. 40 U.S.C. § 276a(b). See, S.Rep. No. 963, 88th Cong., 2d Sess. 1, reprinted in 1964 U.S. Code Cong. & Ad. News, 2339-2346.

The Davis-Bacon amendments were enacted because the Senate Committee on Labor and Public Welfare, the House Committee on Education and Labor, and Congress concluded that a broadened definition of "wages" was needed to restore a competitive balance threatened by an increasing incidence of "fringe benefit" programs. Eight years later, the same Senate and House Committees turned their attention to the Act and its long-needed

reform. Despite knowledge that employers' contributions to a broad variety of "fringe benefit" programs had become an important part of many workers' pay packages and a presumed awareness of the long administrative history of excluding those contributions from "wages," neither of the Committees nor any member of Congress proposed any change in Section 2(13) of the Act; the definition of "wages" adopted in 1927 remained unchanged.

Although there was no direct focus on the Act's definition of "wages" as such, the history of the 1972 amendments to the Act offers strong proof that the parties to that process were well aware of the distinction between included "wages" and excluded "fringes." Indeed, the record is clear that the parties based their debate and their ultimate agreement about appropriate benefit

levels on the definitional premise that "wages" do not include contributions to pension/health and welfare funds.

This Court has already identified the three groups whose interests Congress sought to accommodate in 1972.

> "The 1972 Amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the Amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) shipowners who were discontent with the decisions allowing many maritime workers to use the doctrine of 'seaworthiness' to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties."
>
> (Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 at 261 (1977))

Vessel owners played little role in the process of revising the Act's benefit structure. That dispute was between workers and employers and was limited to finding a mutually acceptable ceiling to an increase for which all acknowledged substantial need.

The key "employer" and "worker" roles in the process of agreeing upon the reformed benefit structure were played by a representative of the shipbuilding industry--Mr. Ralph Hartman[1] --and the spokesman for the AFL-CIO--Mr. Howard McGuigan.

Mr. Hartman and Mr. McGuigan spoke a common language when they discussed reform

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[1] Mr. Hartman later served as a member of the Benefits Review Board and wrote the opinion reversed by the decision below. Mr. Hartman served as Director, Office of Workers' Compensation Programs until very recently.

of the benefit structure. Both defined their terms in testimony closely predating the Amendments themselves. Both thought that benefits should be increased to a level more adequately reflecting "wage" loss. Both distinguished between "wages" and "fringe benefits" and--most importantly--both shared the premise that "wages" do not include the cost or value of employer contributions to pension/health and welfare funds.

Mr. McGuigan illustrated the inadequacies of the then-current $70 weekly maximum by comparison with prevailing "wage" levels in the longshoring and shipbuilding industries and within the District of Columbia. Those tables specifically excluded contributions to

pension/health and welfare plans from the "wage" base.[2]

Mr. Hartman's testimony that those same contributions were properly excluded from "wages" was equally explicit:

> ". . . Currently, the reported average weekly wage in the shipbuilding and ship repair industry approximates $165, which rate covers straight time, overtime, shift work differentials, vacation and holiday allowances.
>
> * * *
>
> "It must be recognized, of course, that there are additional weekly employer costs approximating $25 per week covering other contract-related benefits such as nonindustrial health and accident insurance, pensions, and statutory costs such as Social Security and state and federal unemployment

---

[2] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2d Sess., U.S. Government Printing Office, 1972, pp. 99-110.

compensation. These costs continue during disability."

(Senate Hearings, pp. 182-183, Emphasis added)

The history is clear. Despite recognition by all that "fringe benefits" had become an important part of the overall compensation package offered many workers, employer contributions to pension/health and welfare funds were considered outside § 2(13)'s definition of "wages" at the time the Act's benefit structure was overhauled in 1972.[3] The Court of

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[3] The premise that pension/health and welfare contributions are properly excluded from "wages" is shared by the insurance industry and reflected in its pricing practices. Premiums for workers' compensation and employers' liability insurance are based upon "payroll".

The National Council on Compensation Insurance--the primary workers' compensation rate-making authority--specifically excludes pension/health and welfare contributions from the proper "payroll" base.

Appeals overlooked this important legislative history and, as a result, adopted a definition which violates a basic premise of the 1972 amendments.

II.

THE DECISION BELOW VIOLATES A FUNDAMENTAL TENET OF WORKERS' COMPENSATION STATUTES BY PERMITTING MOST WORKERS TO "NET" MORE OFF WORK THAN ON AND BY ELIMINATING ANY ECONOMIC INCENTIVE TO RESUME PRODUCTIVE EMPLOYMENT

The Act's condition was assessed by the Comptroller General in a report issued April 1, 1982. The Report focused substantial attention on the Act's benefit structure and the problems that result when benefits available for disability begin to exceed "take home" pay.[4]

---

[4] "Take-home" pay equals gross pay minus federal and state income taxes, Social Security (FICA) taxes, and estimated deductions for union dues. Other job-related expenses such as transportation, child care, etc., are not deducted despite the fact that they end or decline during periods of unemployment.

> "These tax-free compensation benefits replace a higher percentage of net pay than they did in the past. In addition, some workers are eligible for other benefits which, when combined with compensation, could result in benefits that substantially exceed preinjury net pay. * * *
>
> "Evidence from private, long-term disability insurance programs indicates that high compensation rates cause disability incidence rates to increase. Private insurance plans with compensation rates over 70 percent of predisability gross income have incidence rates two-thirds above the average, while plans with compensation of 50 percent or less have incident rates one-third below the average. . . ."
>
> (Report of the Comptroller General of the United States, "Longshoremen's and Harbor Workers' Compensation Act Needs Amending", April 1, 1982)

Benefit levels which approach or equal full take-home pay replacement minimize return-to-work incentives and delay the return to productive employment.

Benefit levels which exceed take-home pay encourage exaggeration and malingering.

The Comptroller General demonstrated that most workers receive benefits averaging about 88 percent of pre-injury take-home pay when "wages" are defined to exclude contributions to "fringe benefit" programs. The decision below involved contributions equaling 68 cents per hour, about 15 percent of Mr. Hilyer's apparent hourly wage. The cost of the parallel items required by the contracts governing longshore labor now exceeds $4 per hour, about one-third of the "straight-time" hourly wage. The national average "voluntary fringe benefit" funding package now equals about 28 percent of cash payroll.[5] Addition of a 15-30 percent

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[5] Chamber of Commerce of the United States, Employee Benefits, 1980, p. 8 (1981).

increment to "wages" will cause compensation rates to increase from the current 88 percent of "take-home" to a level substantially exceeding predisability spendable earnings.

The impact on compensation rates of including contributions equaling 15 percent and 30 percent of "gross pay" is shown in the following table:

Average Wage (Selected Intervals)	PERCENT OF TAKE-HOME PAY REPLACED BY COMPENSATION		
	COLUMN A (Current Practice)	COLUMN B (15% Contribution)	COLUMN C (30% Contribution)
$ 1 - 50	109%	129%	146%
51 - 100	110%	127%	143%
101 - 150	98%	131%	148%
151 - 200	81%	100%	113%
201 - 250	83%	95%	108%
251 - 300	85%	98%	111%
301 - 350	87%	100%	113%
351 - 400	89%	102%	116%
401 - 450	91%	105%	118%
451 - 500	93%	107%	121%
501 - 550	96%	110%	125%
551 - 600	98%	113%	127%
601 - 650	100%	115%	130%
651 - 700	101%	117%	133%
701 - 750	104%	120%	135%
751 - 800	106%	122%	138%

Inclusion of contributions to pension/ health and welfare funds in the Act's definiton of "wages" vastly increases the number of workers who receive more for not working than for labor performed. For all but a relatively few workers, all economic incentive to resume employment as soon as medical condition permits is erased. There can be no justification for such a result.

> "Even among those who contend that the scale of benefits is generally too low, there are few if any who would contend that anything resembling tort principles of amount of recovery should be imported into compensation law. It was never intended that compensation payments should equal actual loss, for the reason, if no other, that such a scale would encourage malingering."
>
> (1 Larson, Workmen's Compensation Law, §2.50, pp. 11-12 (1964))

There is similarly little justification for another result of the decision

below. Although inclusion of pension/ health and welfare contributions in Mr. Hilyer's "wages" would increase his widow's benefits, the same reasoning that led to the decision below would lower the rates payable in many cases of total disability.

If contributions to pension/health and welfare funds are "wages" within the meaning of 33 U.S.C. § 902(13), then the receipts from those same funds must also be "wages" within the meaning of 33 U.S.C. § 902(10):

> "(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."
>
> (Emphasis added)

Continued receipt of "wages" in the form of pension/health and welfare plan payments must logically either preclude

an award of total disability--an award which presumes the total absence of wages, or, at the very least, assure that the employer or its insurer receives a credit for the amounts received from the fund.

Those representatives of labor who lobbied for the 1972 amendments would be astonished to learn that they had helped create a benefit structure which offset pension benefits gained through collective bargaining against a compensation entitlement created by statute.

The Court of Appeals issued an opinion which rewards malingering and erases collectively bargained-for benefits because it failed to see what this Court has already recognized: contributions made to fund pension/health and welfare programs--whether measured by hours worked, units built, or tonnage handled--

qualitatively differ from items historically considered to be "wages" under the Act.

"Wages" are paid on behalf of particular workers. Pension/health and welfare contributions seldom reflect an obligation to any particular employee. Instead, unlike historic "wages," most contributions are made to satisfy an overall obligation to all workers, past, current and future. As perceived by this Court in another context,

> ". . . it is inaccurate to describe [pension fund contributions] as having been 'on behalf' of any employee. The trust agreement used employee man-weeks as a convenient way to measure an employer's overall obligation to the Fund, not as a means of measuring the employer's obligation to any particular employee. Indeed, there was no fixed relationship between contributions to the Fund and an employee's potential benefits. A pension plan with 'defined benefits', such as the Local's, does not tie a

> qualifying employee's benefits to the time he has worked . . . . One who has engaged in covered employment for 20 years will receive the same benefits as a person who has worked for 40, even though the latter has worked twice as long and induced a substantially larger employer contribution."
>
> (Teamsters v. Daniel, 439 U.S. 551, 560-61 (1979))

The Court of Appeals overlooked this critical qualitative difference when it equated contributions and wages.

III.

THE DECISION BELOW MAY REQUIRE THE RECALCULATION OF BENEFITS PAYABLE IN HUNDREDS OF THOUSANDS OF CASES "CLOSED" SINCE 1972 AND CAUSE THE COLLAPSE OF THE LHWCA'S ADMINISTRATIVE SYSTEM

The amount of "wages" is central to every LHWCA proceeding. Administrative determinations of accurate "wages" and the calculation of the appropriate benefit rate are conducted in accordance with the Department's Longshore Procedure Manual. The Manual specifically directs the

exclusion of pension/health and welfare contributions.

About 96 percent of all longshore claims are "resolved" by Deputy Commissioners and their claims examiners. Since 1972, the Deputy Commissioners have had no authority to make final determinations of disputed issues. Claims resolved by Deputy Commissioners remain forever open. The amounts of "wages" upon which initial compensation rates are based remain forever subject to redetermination. Intercounty Const. Co. v. Walter, 422 U.S. 1 (1975).

Even those claims in which purportedly final orders have been entered remain subject to the Act's "modification" provisions and eligible for reopening at any time within one year following the date of the last compensation payment in order to permit correction of any "mistake

in a determination of fact". 33 U.S.C. § 922.

Modification remedies have been broadly defined by this Court. O'Keefe v. Aerojet General Shipyards, Inc., 404 U.S. 254 (1971); Banks v. Chicago Grain Trimmers Assoc., Inc., 390 U.S. 459 (1968). The Deputy Commissioner's determination of a compensation rate pursuant to an erroneously restrictive definition of "wages" would certainly qualify as a "mistake".

Unless reversed or ruled to be prospective only, the decision below will require the reopening and recalculation of the benefits payable in hundreds of thousands of post-1972 "time loss" cases.

This Court has recently recognized the enormous impact that changes in previously settled rules can have in the insurance industry.

> "Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. . . . These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result. . . ."
>
> (Los Angeles Dept. of W.& P. v. Manhart, 435 U.S. 702, 721-22 (1978), footnotes omitted).

The decision below will have extraordinary impact, increasing the amounts

payable for compensation and death benefits under the Act by 25 to 30 percent (over $90 million annually) and creating an additional, unanticipated and unrecoverable cost of nearly $450 million if found retroactively applicable to 1972.[6]

The Department of Labor could not perform the tasks necessary to implement retroactive application of the decision below. The number of "lost-time" injuries has nearly quadrupled since 1972. The Department's claims processing staff has grown by only 47 percent--to a total of 147 persons. This staff barely manages its current case load.

The decision below will divert administrative efforts necessary to the

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[6] These figures were drawn from studies performed by the National Council on Compensation Insurance. See, footnote 3, supra.

functioning of a system intended to speed delivery of fair benefits for job-related injury and disease. The required revival of hundreds of thousands of claims will jeopardize the entire structure.

CONCLUSION

The LHWCA must function or fail in a world of reality. Risks must be assessed and shared in advance of their materialization. Goods and services must be priced before the actual final cost can be known.

The evaluation of LHWCA risks and the pricing of the items which must absorb its costs have for more than half a century reflected the consensus that employer contributions to pension/health and welfare funds are outside the "wages" upon which the amount of compensation entitlement is based.

The inclusion of these contributions in the LHWCA's "wage" base will severely wrench an already unsteady compensation structure and create an absurdity--a system in which most workers "net" more off work than on.

The decision below equates amounts paid to specific employees for particular work efforts with amounts contributed in accordance with one of a range of permissible methods of funding a broad variety of "fringe benefits" to past, present, and future members of an employer's work force. The equation should not be drawn.

"Wages" and "contributions" are fundamentally different. The decision should be reversed.

RESPECTFULLY SUBMITTED,

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Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO: The Supreme Court of the United States.

American Insurance Association respectfully moves for an order granting leave to file an amicus curiae brief in the above entitled case pursuant to Rule 42 of the Revised Rules of this Court. Consents of the attorneys for the petitioner and the Federal respondent have been received. Consent of the respondent Hilyer has been refused.

The movant, American Insurance Association (AIA), is an unincorporated trade association of 168 property and casualty insurers. Its members represent a large percentage of the property and casualty industry, particularly in the area of workers' compensation. The most recent figures available demonstrate that in 1980, AIA member companies wrote approximately 50% of the market for workers' compensation insurance. While specific figures are not available, it is estimated that approximately the same percentage of Longshore coverage is written by AIA companies.

The AIA and its member companies are deeply concerned that the ruling of the District of Columbia Circuit Court of Appeals in *Hilyer* will place enormous stress upon all facets of an already overburdened workers' compensation system.

It is the view of the AIA and its members that the practical effect of the *Hilyer* holding will be to defeat the primary purpose of the Act, which is to provide a swift and efficient remedy to injured employees. The AIA, as amicus curiae, seeks to assist the Court by presenting a discussion of the adverse impact of the decision on the efficiency of the Longshore system.

Petitioners and respondents are primarily expected to emphasize the merits of the Court of Appeals' decision vis-a-vis the facts of the instant case and their clients' respective interests, while discussing only peripherally the far reaching implications of the court's ruling. These issues, of utmost importance to the business community and insurance industry, will not adequately be presented by the parties, and it is for this reason that the AIA moves this court for leave to file the attached amicus curiae brief.

The attached amicus curiae brief of the American Insurance Association discusses the design of the Longshore Act, how the decision below injects variables into this design, how such variables are contrary to Congressional intent, and how the decision below simplistically ignores the practical implications of equating "wages" with fringe benefits.

For the foregoing reasons, this motion for leave to file a brief as amicus curiae should be granted.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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BRIEF FOR AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS

The American Insurance Association (AIA) is an unincorporated trade association of 168 property and casualty insurers. AIA member companies write 50% of *all* workers' compensation insurance in the United States and presumably an equivalent percentage of Longshoremen's and Harbor's Workers' Compensation Act ("LHWCA" or "the Act") coverage.

The AIA and its members are concerned that the impact of the decision below on the insurance industry specifically and the economy generally will be disastrous.

The premium cost to employers for workers' compensation under the LHWCA is already so high that in some cases it may actually threaten to overtake payroll. For example, the compensation premiums in New York are between $84.00 and $87.00 per $100.00 of payroll as compared to as little as $3.00 in some Canadian ports. This quite clearly removes any competitive position the United States ports might have had and has caused an estimated loss of $3,000 – 4,000 jobs as cargo shipments are diverted to Canadian ports. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S.1182 Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources,* 97th Congress, 1st Session, ("1981 Senate Hearings") pp. 224, 234-235, 1176. The high premiums now existing for LHWCA coverage have already had a substantial impact elsewhere in the economy. For example, it has been estimated that from 1970 to 1976, the District of Columbia lost 108 firms and approximately 15,000 jobs, an estimated loss of $180 million in payroll per year, due in substantial part to already unnecessarily high premiums. 126 Cong. Rec., February 7, 1980 (H 745); Report, Committee on Housing and Economic Development on Bill 3-106, The District of Columbia Workers' Compensation Act of 1979, January 8, 1980, pp. 3, 4. In 1975, 568 private employers were insured by an assigned risk pool, whereas in 1978, the number had grown to 24,000. *Id.,* at 5.

The facts and statistics demonstrating the adverse impact of the LHWCA on American's economy pertain to the facts *before* the decision in this case was rendered. The main reason for the problem has been the uncertainty and variables already in the Act. The decision below adds another variable, one so pervasive and fundamental to the system as to be contrary to the entire design of the Act. The AIA strongly urges reversal in the interest of claimants, Longshore employers, insurers and the American economy, which will otherwise suffer.

SUMMARY OF ARGUMENT

The entire structure of the Longshoremen's and Harbor Workers' Compensation Act is established in order to provide prompt and readily calculable benefits to injured workers not in an attempt to make such workers equitably whole, but to set statutory benefits at a level sufficient to permit the worker to live in a manner generally consistent with his prior level of earnings. The statutory scheme was the result of an historical compromise established to provide a *limited level of benefits promptly* to *all* injured workers.

The approach espoused by the Court of Appeals of attempting to restore to an employee the "value" lost due to an injury nullifies this compromise not only by erasing the limit of liability, but also by so complicating administration under the Act that payment of benefits will be extensively delayed. The Court of Appeals has taken the fundamental foundation of workers' compensation benefits – the definition of "wages" – and grafted upon it a valuation concept comprised of factual issues which will promote and require constant litigation and factfinding. During the entire history of the Act, the administrative treatment of "wages" has been routine and straightforward. The Court of Appeals' inconsistent interpretation of the wage concept will therefore severely interrupt the smooth administrative machinery established by Congress.

The consistent administrative interpretation of the concept of "wages" not only reflects Congressional intent, but has been ratified by later Congressional enactments. Although the Court of Appeals' simplistic adoption of a new approach to wages fails to foreshadow the havoc which will befall the administrative process and the orderly payment of compensation benefits, closer scrutiny clearly indicates that fringe benefits cannot neatly fit into the concept of "wages" as suggested by the Court of Appeals, because they do not conform to the manner in which the Act was structured and has been applied.

ARGUMENT

I. THE DEFINITION OF "WAGES" AND THE AVERAGE WEEKLY WAGE FORMULA WERE DESIGNED TO GENERATE A FINITE STATUTORY REMEDY FIGURE AND *NOT* TO PROVIDE TORT DAMAGES

A. The Societal Problem

The primary intent of Congress in structuring the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.*, ("LHWCA" or "the Act") was to create a swift statutory remedy for workers injured in industrial accidents. At common law, the only recourse for injured workers was a suit for damages predicated on the negligence of the employer. Even if negligence could be proven, all common law defenses could be raised by the employer, including contributory negligence, assumption of the risk and negligence of a fellow servant, all of which would preclude any recovery. The worker, on the other hand, if successful, could claim damages which were limited only by the conscience of the jury and the limited reviewing power of the judge. Unfortunately, this system could not accomplish the societal goal of providing financial support to an injured worker when he needed it most, immediately after the injury. The tort remedy was extremely slow. Often, the more severe the injuries, and thus the greater the need, the longer it took to obtain recovery.

In order to accomplish the desired speed and to insure the worker a guaranteed recovery regardless of proof of negligence, a legislative compromise was reached between the competing rights of employers and workers. This court discussed this compromise in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 n. 24 (1980) (*"PEPCO"*):

> Workmen's compensation acts are in the nature of compromise or quid pro quo between employer and employee. . . .In return for a fixed schedule of payments and a fixed amount in the event of the

> worker's death, employers are made certain that irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries. 1 M. Norris, *The Law of Maritime Personal Injuries*, § 55, p. 102 (3d ed 1975).

The "prime purpose" in formulating the Act was to create a "practical and expeditious remedy." *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 476 (1947). The worker bargained for certainty of recovery and speed. In exchange, the worker waived the right to seek unlimited tort damages and agreed to a defined and limited statutory benefit.

This court in construing the Act must therefore be mindful of the fact that the "tort approach" of compensating for actual loss was purposefully rejected by Congress in its legislative manifestation of the compromise. As Professor Larson states in his oft-cited treatise:

> A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others.

1 Larson, *Workmen's Compensation Law*, § 2.50, p.11.

This Court has previously recognized this important distinction between the tort approach and the worker's compensation remedy:

> While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits on potential liability than

> would have been applicable in common-law tort actions for damages. None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of earnings.

PEPCO, supra, at p. 281.

In response to the societal problem, the historical compromise eliminated the issue of liability, rejected the tort approach to damages, and created a new device tailor-made to provide not damages but a definite statutory remedy capable of producing rapid results.

B. The Congressional Response

The system established by the LHWCA is therefore intended to provide a swift certain statutory remedy, rather than tort damages. To reduce the time lag in receiving benefits to the barest minimum, the procedures created for generating the compensation benefit amount are such as to require simple and mechanical application of a formula to objectively available data.

The first step in the calculation of benefits is to determine what average weekly wages the employee was earning prior to his injury. "Wages" is defined to mean:

> . . . the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13)

With this definition, the average annual earnings are computed using one of the three alternative methods set forth in 33 U.S.C. § 910(a), (b), and (c). The figure obtained using one of these formulas is then divided by fifty-two to yield the average weekly wage. 33 U.S.C. § 910(d) The procedure established by § 910, by virtue of the alternative computation methods, thus contains built in flexibility which is designed to equitably approximate the claimant's average weekly wage. The beauty of the system is that while it is flexible and adaptable it nevertheless utilizes concrete figures and avoids variables in its definition of "wages" and its method of calculation of average weekly wage.

The average weekly wage figure is the foundation of the entire compensation system. Its sole purpose is to set a statutorily defined figure from which all compensation benefits can be calculated. Disability benefits for temporary total or permanent total disability are calculated as 66-2/3 per cent of average weekly wages. 33 U.S.C. § 908(a) and (b). Disability benefits for total or partial loss or loss or use of one or more listed body parts are statutorily defined to be 66-2/3 per cent of average weekly wages payable for the number of weeks set forth in the schedule. 33 U.S.C. §§ 908(c)(1)-(19).

Disability benefits for permanent partial disabilities, other than those listed in the schedule, and benefits for periods of temporary partial disability, are calculated at the rate of 66-2/3 per cent of the difference between a claimant's average weekly wages and his post-injury wage earning capacity. *PEPCO, supra;* 33 U.S.C. § 908(c)(21); 33 U.S.C. § 908(3). The calculation of wage earning capacity for non-scheduled partial disabilities is determined either by an individual's actual post-injury earnings or by fixing a reasonable wage earning capacity based upon the facts of the case. 33 U.S.C. 908(h); *Devillier v. National Steel and Shipbuilding Company,* 10 BRBS 649 (1979). In death cases, survivors' entitlement to compensation benefits range from 20 per cent to 66-2/3 per cent of average weekly wages,

depending upon the nature of the survivor's dependency. 33 U.S.C. § 909(b), (c), (d).

It is clear from the foregoing that every formula for calculating the amount of benefits to which the claimant is entitled relies on the previous computation of average weekly wages. In order to accomplish the primary objective, prompt and certain calculation of benefits, Congress was careful not to inject variables into the wage concept.[1]

Congress' determination to avoid individual variables in favor of definite and readily calculable benefit amounts is evidenced throughout the Act. Congress *could* have allowed benefit amounts to vary by tailoring them to the worker's take-home pay. *Instead,* it assigned the arbitrary approximation of 66-2/3 per cent of gross pay. Congress *could* have allowed benefits to vary by permitting an analysis of the actual value of the loss of any part of the body to the claimant's occupation. *Instead,* it established the rigid schedule of predetermined values. 33 U.S.C. § 908(c)(1)-(19). Congress *could* have allowed benefit levels to vary without limitation depending on income level. *Instead,* it set a specific maximum which prior to the 1972 amendments to the Act was set at $70.00, hardly allowing restoration of "values received."[2] Congress *could* have defined benefits for a surviving a spouse and surviving children based upon calculation of extent of dependency and actual loss of support. *Instead,* Congress chose arbitrary benefit percentages to establish the benefit level for surviving spouse and children, and set an arbitrary two year lump sum benefit figure upon remarriage. Congress *could* have extended death benefits to a surviving spouse of a worker receiving permanent total disability benefits only

[1] The term "wages" as defined in 33 U.S.C. § 902(13) is also crucial to the determination of residual "*wage* earning capacity," 33 U.S.C. § 908(c)(21), (e), and (h)), and maximum and minimum compensation based upon the "national average weekly *wage*." 33 U.S.C. § 906.

[2] Even the current maximum, keyed to the national average weekly wage, does not allow values lost above that amount to be recompensed. 33 U.S.C. § 906(b).

where death was related to the employment injury. *Instead,* Congress chose the more certain and definitive route of extending death benefits to such a spouse without a factual inquiry on causality. Congress *could* have attempted to approximate the expected loss of earnings suffered by a worker by terminating benefits as of the worker's anticipated retirement age, when his earnings would be expected to stop. *Instead,* Congress chose to provide lifetime benefits. In each instance Congress refused to include variables and established specific defined values and mandatory results.

Because the "prime purpose" of the Act is to provide a practical and expeditious remedy, *Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469, 476 (1947) and its "design" in keeping with that purpose is one which encourages "prompt and expeditious adjudication of claims," *Norton v. Warner Co.,* 321 U.S. 565, 568 (1944), Congress scrupulously avoided injecting variables into the scheme of the LHWCA. The circuit courts should not now be permitted to thwart the Congressional purpose by judicially legislating variables into the system.

II. INCLUSION OF FRINGE BENEFITS IN THE DEFINITION OF "WAGES" INJECTS VARIABLES INTO THE ADMINISTRATIVE PROCEDURE

The tort damages concept adopted by the Court of Appeals directly contravenes the Act's purpose of providing a swift and certain remedy to injured workers and will inject factual uncertainty and evidentiary issues requiring administrative action in cases arising under the Act.

A. The Definition of Wages is a Matter Basic to the Act.

Although the case at hand presents the issue of average weekly wages in connection with a death claim, that fact is not material to resolution of the issue, as the statutory provisions pertaining to average weekly wages are just as applicable to

disability claims as they are to death claims. Average weekly wages are used in every worker's compensation case to provide the basis for calculating any resulting period of disability, whether temporary or permanent, total or partial, scheduled or unscheduled and to provide the basis for calculating any death claim.

Parameters in the Act setting maximum and minimum compensation rates are determined with reference to the "national average weekly wage," established annually by the Secretary of Labor. 33 U.S.C. § 906(b). Under the statute, disability benefits may not exceed 200% of national average weekly wages, and may not be less than 50% of national average weekly wages or a claimant's average weekly wages, whichever is less. 33 U.S.C. § 906(b). Death benefits may not be less than the national average weekly wage or the decedent's average weekly wage, whichever is less. *Director, OWCP v. Rasmussen,* 440 U.S. 29 (1979). A claimant receiving permanent total or death benefits is entitled to an annual benefit adjustment determined by the percentage increase in the national average weekly wage. This national figure, as historically calculated by the Secretary of Labor, has *never* included fringe benefit contributions.

Due to the pervasiveness of fringe benefit contributions throughout the work world,[3] the decision below would significantly change the compensation rate calculated from average weekly wages in many cases, and, more importantly, would transform the routine calculation of wages into a subjective skirmish of valuation. In all cases of temporary partial or non-scheduled permanent partial disability, in addition to valuation of pre-injury fringe benefits to establish average weekly wages, a calculation of fringe benefits received post-

[3]The United States Chamber of Commerce has calculated that *voluntary* fringe benefit payments in 1980, exclusive of statutorily required payments, were approximately 28% of payroll. Chamber of Commerce of the United States, *Employee Benefits, 1980,* p. 8 (1981) (1615 H Street, N.W., Washington, D.C. 20062).

injury would also be necessary to determine residual wage earning capacity. In such cases it would be necessary to investigate the relative "value" of fringe benefits before and after the injury to address loss in wage earning capacity. 33 U.S.C. §§ 908(c)(21) and (e); *Devillier v. National Steel Shipbuilding Co., supra.*

In all cases at the maximum or minimum rate, revision of the national average weekly wage to include all fringe benefits would be required and would alter the compensation benefits. 33 U.S.C. § 906. The change in national average weekly wages would have the secondary effect of revising the annual adjustment of persons receiving permanent total disability benefits or death benefits. 33 U.S.C. § 910(f). Inclusion of fringe benefits in the definition of "wages" would therefore be felt on a practical basis at not just one, but frequently two or more stages in workers' compensation cases. To bring national average weekly wages in line with the Court of Appeals' decision below would require either retroactive recalculation of national average weekly wages by the Secretary of Labor, or a mammoth one-year adjustment to introduce fringe benefits and substantially alter the annual modification. 33 U.S.C. §§ 906(b)(3), 910(f)-(h). The opinion below therefore not only would raise numerous issues in pending and future cases but also may require re-activation of numerous dormant or uncontested cases for adjustment on one or more issues.

B . The Reasoning Adopted Below Marks a Fundamental Change in the Concept of Compensation.

The Court of Appeals holding in *Hilyer* expressly requires only that fringe benefit contributions of employers into Taft Hartley trust funds be included in calculation of average weekly wages. In order to reach that conclusion, however, the court followed an approach which, if it is adopted by this Court, suggests the inclusion of numerous other indirect fringe benefits in wage calculations. The analysis espoused by the Court of Appeals is that if a benefit has economic value to an employee, and

if the value received by the employee is reasonably identifiable and calculable, then it must be included in wage calculations. While the court held that one reasonable method of valuing the benefit to an employee of participation in Taft Hartley trust funds is to use the amount of the employer's contribution to the general fund, its analysis was based upon determining a reasonable calculation of the value of a benefit to the employee.

Once courts break from the notion that the term "wages" is a statutory definition whose only purpose is to define a statutory benefit level, and instead embrace a flexible concept which attempts to identify the value of benefits, then there is no rational differentiation between Taft Hartley fringe benefits and numerous other perquisites which undeniably have value to the employee. This tort approach requires that the several issues of average weekly wages[4], residual wage earning capacity[5], maximum and minimum compensation rates[6] and annual adjustments[7] be examined in light of such other incidental benefits as employer-provided group health policies, employer-provided group term life insurance, medical reimbursement plans, corporate profit-sharing and pension plans, continuing professional educational programs, travel allowance to professional conferences or meetings, disability insurance, employer-provided parking, employer social security contributions, unemployment compensation insurance, individual life insurance and a potential host of less clearly identifiable items determined nevertheless to be of value.

Since workers' compensation insurance itself clearly confers a benefit upon employees, by protecting them against medical expenses and loss of wages for employement injuries even if the injuries are solely their own fault, it is indistinguishable from Taft Hartley fringe benefits. Logically extended, therefore, the tort approach also includes the employer's payment of this premium

[4]33 U.S.C. § 910

[5]33 U.S.C. § 908(c)(21) and (e)

[6]33 U.S.C. § 906

[7]33 U.S.C. § 910(f)

in "wages."[8] This result is obviously absurd and cannot be consistent with the intent of Congress. As the Court of Appeals' analysis cannot logically differentiate between these benefits, and therefore requires inclusion of both, it is evident that the approach itself is faulty.

Once the door is opened such that calculation of wages becomes a subjective attempt to determine the value to an employee of the terms of his employment, including indirect benefits, then the Act passed by Congress will have undergone a basic metamorphosis. The impact of the change in the concept of wages is enormous.

C. The Approach Adopted Below Will Affect the Administration of the Act by Raising Uncertainty in the Determination of Compensation Payments and Will Defeat the Congressional Purpose of the Act.

To apply the Court of Appeals' standard of attempting to determine the real "value" to a claimant of an incidental benefit requires time-consuming analyses which are clearly repugnant to the self-executing purpose of the Act. Actual "value" of wages to an employee can only be measured after taking into account such reductions as state and federal income taxes, social security, plus other payroll deductions. Such an approach has clearly been rejected by Congress. The sheer complexity of shifting to a tort approach to determining compensation benefits is sufficient alone to identify it as a poor route to follow.

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[8]Peculiar ramifications would be felt as a result of this concept. For example, Longshore compensation premiums in New York are already 84% - 87% of payroll, and would rise *above* payroll if fringe benefits were to be included in wages. *See, Wall Street Journal,* May 21, 1981, p. 26; *1981 Senate Hearings,* p. 1176. The spiraling effect of including these premiums themselves in wage calculation would result in injured employees receiving compensation benefits tax free in an amount susbstantially in excess of actual pre-injury reportable *gross* earnings.

Currently, in the vast majority of cases, compensation is voluntarily and automatically paid to the claimant without an award or any litigation. *See,* 33 U.S.C. § 914(a). The adjudicatory process is activated only when a claim is initially controverted or thereafter when voluntary compensation benefits are reduced or terminated. *See, e.g., Prime v. Todd Shipyards Corp.,* 12 BRBS 190 (1980). The first step in the adjudicatory process is the informal conference before a deputy commissioner, who thereafter issues a recommendation. 33 U.S.C. § 919; 20 C.F.R. § 702.311 *et seq.* If either party rejects the recommendation, the case is then set for a formal evidentiary hearing before an administrative law judge. Decisions of administrative law judges are subject to review by the Benefits Review Board whose order may then be appealed to the United States Court of Appeals. 33 U.S.C. § 921.[9]

Absent the injection of a new variable, more than 85% of all lost-time claims were voluntarily and informally resolved without even an informal conference As to those cases which do proceed to litigation, formal hearings are frequently not scheduled for approximately six months, and often decisions are not handed down until three to twelve months thereafter. *1981 Senate Hearings* at 1224. The Director of Workers' Compensation Programs has estimated that cases generally take three to four years to go through the full administrative process. *Id.* at 1164, 1224-1225.

The primary effect of the tort approach to wage calculation on the administrative scheme would be to create uncertainty in an area where a simple, determinate and easily calculable for-

[9]In 1981 there were 61,000 lost-time injuries covered by the Act (excluding the District of Columbia), a figure which the Department of Labor projects will increase. In 1981, while 56,000 lost-time cases were closed (excluding cases under the District of Columbia extension), only 8,300 informal conferences were held. United States Department of Labor, *1983 Budget Justifications of Appropriations Estimates for the Committee on Appropriations* (January 1982), p. ESA – 33. Of 5,538 cases going before administrative law judges, only 2,968 were disposed of. *Id.*, p. DM - 38. The Benefits Review Board's 1981 docket consisted of 1,002 cases. *Id.*, p. DM - 42.

mula is desired. Litigation would likely be fostered concerning the types of benefits to which this approach applies. This is particularly true because there is incentive in the Act to pursue litigation through the entire process since attorneys' fees are assessed against the employer and carrier if counsel is successful in obtaining *any* additional benefits for the worker beyond what has been voluntarily paid. 33 U.S.C. § 928(a)

In addition to questions concerning the type of fringe benefits to be included in wages, uncertainty would also be created as to how the value of those benefits is to be determined. Although the Court of Appeals says that it is "reasonable to measure [the] value by the amount of the employer's contributions," *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (1981), it nowhere says that this is the *only* permissible method of calculation. Further, many benefits are funded not by contributing to a trust fund, but directly by the employer, and valuation of these types of benefits would necessarily be complex.

Given the unsettled legal and factual questions raised by a new concept of wages, it is naive to suppose that employers and carriers would, as in the past, amicably stipulate to average weekly wages and forego the right to present evidence on valuation when a claimant is injecting fringe benefits into his wage calculation. It is equally naive to think that claimants' attorneys, with the incentive of employer-subsidized fees, 33 U.S.C. § 928(a), would accept tendered payments which include less than all "fringe benefits," using the most expansive definition of the word. A greater percentage of cases will almost certainly proceed to the informal conference stage. With the non-binding effect of the Deputy Commissioner's recommendation, it is likely that the bulk of factual issues concerning average weekly wage, now avoided by the certainty of the Act, would require ALJ action, increasing the workload geometrically, and extending the already intolerable delay in the administrative process. Every case raising a new type of benefit, or combination of benefits, or a new method of valuation, would be a case of first

impression, and the party adversely affected would therefore certainly seek review by the Benefits Review Board. Parties dissatisfied with the administrative law judge's factual resolutions would likewise add to the Board's increased caseload, greatly delaying the payment of benefits. An already overburdened and backlogged system will literally grind to a halt under the weight of fringe benefit valuation litigation.

While legal issues concerning what benefits are included in wages and which valuation approaches are permissible may ultimately be resolved through a long series of appellate cases, the factual issues concerning valuation of specific benefits will become a permanent fixture in workers' compensation litigation. Such a result would not be consistent with the Congressional mandate of prompt distribution of benefits.

D. The Tort Approach Defeats the Historical Compromise.

Inclusion of fringe benefits in "wages" deprives both employers and employees of what they bargained for in the compromise which was the foundation of the LHWCA. Employers would lose the lower limits of liability established by the Act. Numerous fears have been expressed that benefit levels are already so high that malingering is encouraged and there is generally no advantage for a worker to return to work. *1981 Senate Hearings,* pp. 41, 315-317, 321-23, 818-20, 822-23. The 66-2/3 benefit levels set in 1927 clearly fail to reflect far different levels of payroll deductions for income taxes and social security in 1982, with the result that currently workers' compensation benefits are not significantly less than a worker's net take-home pay. *1981 Senate Hearings,* pp. 42-43, 731, 821, 823, 973. A single worker in 1982 with income of $26,000.00 per year may already be entitled to receive workers' compensation benefits in an amount greater than his take-home pay net of the deduction for federal and state income taxes and FICA, depending upon the state income tax rate.[10]

[10]For example, assuming a standard deduction, earnings of

If such a worker's average weekly wages were calculated by including fringe benefits of 28% of that amount, he would be entitled to $4,853.33 additional compensation benefits per year, or almost $99.00 *more* per week than he took home when he was working.[11] This is contrary to limited liability bargained for by employers.

Ironically, however, the party damaged the most by this tort approach may be the injured worker himself. It was recognized in recent legislation hearings that the practical effect of higher workers' compensation premiums is to cause less employer funds to be available for actual wages for productive workers. *1981 Senate Hearings,* pp. 25, 246-247, 654, 730, 744, 752, 754, 780, 781, 787, 937, 948, 953, 1071, 1072, 1129. More importantly, however, in attempting to increase the worker's recovery by reinstating tort-style damages, the Court of Appeals has inadvertently but undeniably reinstated the tort-style timetable. Instead of the immediate benefits the claimant bargained for and obtained through the compromise embodied in the Act, a slow litigation process through an overburdened system will be necessary, during which time the claimant may well have no means of support. The Act was designed to avoid just such a result:

> . . . contest and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged.

Norton v. Warner, supra, 321 U.S. at 1569.

$26,000.00 less a personal exemption of $1,000.00 yields taxable income of $25,000.00. Payroll deductions for federal taxes of $5,362.00, District of Columbia income taxes of $1,850.00 and a 6.7% FICA contribution of $1,742.00 results in take home pay of $17,046.00, or 65.6% of gross pay, as compared to potential compensation benefits of $17,333.33 or 66.7% of pay. 26 U.S.C. § 1(c); D. C. Code § 47-1806.3.

[11] See footnote 3. On hypothetical "wages" of $33,280.00 (128% of $26,000.00) the worker would receive annual workers' compensation benefits of $22,186.67, or $5,140.67 more than when he was working.

Rather than discouraging contests and delays, the Court of Appeals approach in this case invites them by fostering uncertainty in the benefit calculation formula. The once easy computation of average weekly wages will become the subject of floods of litigation, the impact of which will be to drown the administrative process and to defeat the very purpose for which the Act was created.

III. THE TORT APPROACH IS CONTRARY TO THE HISTORICAL APPLICATION OF THE ACT WHICH CONGRESS HAS CONSISTENTLY RATIFIED

The statutory provisions defining "wages" and pertaining to determination of average weekly wages were enacted in March, 1927, and have continued in their original form without material amendment. 33 U.S.C. §§ 902(13), 910(a)-(b). Prior to the Court of Appeals' decision below, no reported decision under the Act included fringe benefit contributions in an average weekly wage determination. When previously confronted with the issue, the Benefits Review Board uniformly rejected attempts to include fringe benefit contributions. *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), (*appeal pending in* 5th Cir., Nos. 81-4258 and 81-4273); *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), (*reversed* in 9th Cir., No. 79-7094; based on D.C. Circuit opinion below); *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Hilyer v. Morrison Knudsen Construction Co.*, 6 BRBS 754 (1977); *Collins v. Todd Shipyard Corp.*, 5 BRBS 334 (1977).

The Department of Labor, Office of Workers' Compensation Programs ("OWCP"), the Agency charged with administration of the Act, has maintained a consistent administrative interpretation of the Act excluding fringe benefits from average weekly wages. *See,* U.S. Department of Labor, LS/HW Program Memorandum No. 32, June 17, 1968. (Appendix A hereto) Examples of the implementation of average weekly wage calculations excluding fringe benefit contributions are strewn throughout reported case law, giving concrete form to the

historical administrative interpretation. The Court of Appeals' decision below necessarily requires a reversal of 55 years of consistent application of the Act.

In 1972, Congress undertook to substantially amend the Act. The prime focus at that time was benefit levels, particularly the statutory maximum and minimum. *See, Director, OWCP v. Rasmussen,* 440 U.S. 29 (1979). When analyzing the adequacy of maximum and minimum benefits, significant amounts of discussion focused on the prevailing wage rates in the longshore industry. In most cases the wage figures reflected traditional concepts of gross earnings. *Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor,* 92d Congress, 2d Session (*"1972 House Hearings"*) pp. 63, 208-213; *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S.2318, S.528, and S.1547,* 92d Congress, 2d Session (*"1972 Senate Hearings"*) pp. 68, 73, 266-270; *1972 Senate Hearings,* pp. 98-111, 690-694. The AFL-CIO, an amicus curiae on behalf of Respondent Hilyer in this case, at the time of the 1972 Senate Hearings presented wage tables which specifically did not include fringe benefits. *1972 Senate Hearings,* pp. 98-111. Similarly, attorney Joseph Koonz, Jr., a respected claimant's attorney and counsel of record for the AFL-CIO as amicus curiae in this matter, in 1972 referred to wages using a traditional "dollar income" and "salary" approach. *1972 Senate Hearings,* p. 166. The theory that "wages" includes fringe benefits is therefore a new idea, one which neither Congress, nor unions, nor claimant's attorneys had thought of as of the most recent amendments to the Act.

Congress, apparently satisfied with the administrative interpretation of the term "wages," did not seek in 1972 to broaden it, although it clearly could have done so if the administrative

interpretation was not consistent with its intent.[12] Congress clearly never intended for the fringe benefit variable to be injected into the calculation of average weekly wage. No one prior to this case thought "wages" included fringe benefits. 1972 *Senate Hearings*, pp. 98-111, 166. due to the violence that this tort approach inflicts on the administration of the LHWCA, the Court of Appeals must be allowed to legislate a new definition of "wages" into the Act.[13]

IV THE COURT OF APPEALS' APPROACH IN EQUATING FRINGE BENEFITS TO "WAGES" IS OVERLY SIMPLISTIC BECAUSE FRINGE BENEFITS DO NOT FALL NEATLY WITHIN THE STATUTORY FRAMEWORK OF COMPENSABLE BENEFITS

Application to actual situations of the Court of Appeals' tort approach redefining "wages" graphically demonstrates the specter which would haunt the administrative process following adoption of such a concept. While the Court below asserts, without in-depth analysis, that the specific Taft Hartley funds in this case provide value to the employee, and thus satisfy the initial inquiry of the tort approach, a full inquiry into the matter may well require a detailed analysis of the provisions of the benefit plan.[14]

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[12]In 1972, Congress added § 17(b) to the LHWCA, authorizing a lien on compensation benefits in favor of Taft Hartley trust funds in certain circumstances. 33 U.S.C. § 917(b). Congress was therefore mindful of an interplay between fringe benefits and compensation benefits, but nevertheless did not alter the definition of "wages."

[13]The Senate Committee on Labor and Human Resources has proposed that the definition of "wages" in the Act be amended to specifically exclude fringe benefits. *Bill S. 1182*, 97th Congress, 2d Session, § 2(13). The purpose of the change is *"to confirm past practice and Congressional intent and to reaffirm the previously settled rule that fringe benefits are excluded. . ." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1982: Report to Accompany S. 1182*, Senate Committee on Labor and Human Resources, 97th Congress, 2d Session, p. 41.

[14]Although the Employees' Retirement and Income Security Act of 1974 placed certain limitations on permissible plan provisions, there is

For example, with respect to contributions made to a training fund, the fact finder must inquire into whether the fund provides skill improvement training for experienced workers, or merely provides training for apprenticeship, thus having no value to the worker upon whose hours the contribution is calculated.

With respect to welfare plans, a worker only receives value by virtue of his eligibility to participate in the plan. To determine whether an employee has received value, therefore, a fact finder would need to examine whether the worker had attained the minimum age for participation (where applicable) and the required length of service (where applicable). In those welfare plans in which a participant must work a certain number of hours per year to retain eligibility, inquiry must be made into whether that eligibility continues despite the disability. Generally, any contributions made to such a plan above the minimum number of hours necessary for the worker to be eligible for benefits do not enhance the worker's benefits, and are therefore of no "value." A fact finder must therefore determine which contributions have value, and which are excess contributions inuring only to the benefit of the general fund. Pension benefit contributions may likewise be of no value unless the employee is eligible and has at least some vesting credit. Contributions above a certain limit each year in many cases do not operate to increase the ultimate pension.[15]

Once it is determined that a particular contribution is of some value, a fact finder would then confront the even more elusive

---

a wide latitude available to plans in areas of eligibility, vesting and benefit levels. *E.g.*, 29 U.S.C. §§ 1053, 1054; 26 U.S.C. § 411.

[15]One does not obtain equity in these funds. Rather one qualifies for standard pension benefits through the eligibility rules of the plan.

issue of how to value the benefit. Although the Court of Appeals seized upon a handy figure to represent one reasonable method of valuation, it did not assert that such a valuation is the only appropriate method. In single employer plans, which provide fringe benefits similarly of "value" to employees, the employer typically funds the plan not with contribution based upon hours, but upon an actuarial determination of the cost of administration of the plan as a whole. In these plans there is no simple or obvious dollar figure which can be plucked from the air to represent the value to the worker. In either hourly contribution fringe benefit plans or employer administered plans there are obviously several different possible approaches to valuation. The Court of Appeals identified cost to the employer. Alternatively, a party may present evidence of the market value of obtaining similar benefits on the open market. The question of whether a comparable insurance policy is sufficiently identical to plan benefits to constitute evidence of value is a factual issue of valuation which poses a difficult question to the fact finder. The employer and the employee will urge upon the fact finder a valuation approach which is most consistent with their respective interests.

Where a contribution is made to a benefit fund which provides some benefits for which the worker is eligible, and other benefits for which he is not, as in the case of a training fund which maintains separate apprenticeship courses and advanced skill improvement courses, the valuation will require either a rational division of the contribution into that portion representing value to the employee and that portion being used only for apprenticeship, or a separate valuation inquiry to analyze the elusive value to the worker of the availability of advanced training facilities. Similarly, where a welfare fund functions through hourly contributions based solely on hours worked, beneficiaries with dependents who share eligibility receive a benefit of substantially greater value than unmarried participants, as a family health policy would have a higher cost or market value than an individual policy. A fact finder would have to resolve these differences.

Inclusion of the value concept in the definition of "wages" therefore raises substantial issues in determining average weekly wages. This approach, however, does not end with that calculation, since in a very high proportion of cases, the value of a fringe benefit, unlike traditional wages, does not cease at the moment a disability starts. In those cases, it would be necessary to conduct a separate inquiry into the residual value to the employee of the fringe benefit in order to avoid a double recovery which might arise if he were to receive both the value of the fringe benefit *and* worker's compensation payments calculated with reference to the fringe benefit. Thus, for example, were a widow to receive not only a lump sum death benefit or proceeds of insurance but also workers' compensation consisting in part of the cost of the policy, she would recover twice. Also, in most health and welfare plans, eligibility once earned is not lost during periods of temporary disability, because the worker has sufficient prior eligibility credit to carry him for substantial periods of time.[16] Frequently the plan provides specifically that the individual is to receive eligibility credit for future periods during periods of disability. In either case, the individual will not lose the value of the benefit of the trust fund. To include that benefit in the average weekly wage calculation would again amount to double recovery.

Likewise, in cases of permanent total disability, a claimant is entitled to disability benefits for the remainder of his life, and to that extent, disability benefits approximate a pension. To permit a claimant to receive both a higher compensation rate due to inclusion of prior pension fringe benefit contributions, and also to receive disability benefits beyond his anticipated retirement date, again would result in double recovery. Similarly, death benefits are payable for the life of the surviving spouse, and to that extent such benefits approximate a joint and survivor annuity pension rather than an income replacement. Again, to

[16]It has been estimated that 95% of compensation injuries are resolved with no permanent effects. *1981 Senate Hearings*, p. 6.

provide for a virtual annuity using a rate calculated at a higher level due to inclusion of pension benefit contributions would be duplicitous.

While the Court of Appeals opinion deals specifically only with Taft Hartley trust funds, its conceptual approach could apply to numerous other fringe benefits, the loss of which does not coincide with the onset of a disability. Thus, for example, employer provided or employer paid parking is of clear and calculable benefit to an employee. Yet when the employee is disabled and therefore not in need of a parking space or reimbursement for parking, he has not lost the value of that fringe benefit. The D.C. Circuit's approach to calculation of average weekly wage, however, could include that benefit as an "identifiable and calculable" valuable element of wages. Likewise, employer purchased disability insurance, employer contributions to Social Security and premiums for workers' compensation coverage all provide a benefit to the employee and relieve him of the need to purchase equivalent private insurance. A disabled employee would receive the proceeds of one or all of these types of insurance during disability. During disability he would not have the hypothetical need to seek these types of disability insurance on his own, and he would in any event be receiving the benefits of them. To provide him with higher workers' compensation benefits is simply to give him a windfall. These illustrations demonstrate that fringe benefits, whether obtained through Taft Hartley trust fund contributions or provided through direct payment from an employer, can be varied and complex and do not fit neatly into the same conceptual niche as traditional wages, which stop at the onset of disability. To require equitable inquiry into the "value" of particular benefits would require careful and complex analyses of a myriad of factual issues contrary to the Act's design of swift and definite administration.

Since the Act defines "wages" in a manner which does not vary with the type of disability, calculation of average weekly wages cannot be self-adjusting to account for situations where

the value of a certain benefit would not be lost during a period of temporary disability but would be lost during a long disability[17] or vice versa. [18] In the frequent situation in which an injured employee has different periods of both temporary and permanent disabilities, in order to account for the fact that the worker has not lost "value" during the periods of disability, separate factual inquiries must be engaged in to determine the worker's wages after the disability.

If participation in a health and welfare plan is "wages" before an injury, then continued participation is certainly "wages" during the various periods after the injury. Computation of the value of a fringe benefit or the continuing residue of the benefit after the injury would be necessary under §§ 8(c)(21) and 8(e) of the Act in appropriate cases of permanent partial or temporary partial disability respectively. 33 U.S.C. §§ 908(c)(21) and 908(e). It is obviously straining the Act to suggest that a comatose injured worker whose eligibility under a health and welfare plan continues is only temporarily partially disabled, but that is precisely the result which follows from inclusion of fringe benefits in wages, since continued eligibility is clearly of value to him, and he would thus be earning "wages" during disability. During the same period of disability, wherein participation in fringe benefit funds start and stop, there may be several different compensation rates due to the differences in residual "wages." Calculation of compensation benefit rates will differ between periods of temporary disability, permanent disability and death benefits depending upon the changing status of participation in fringe benefit plans. Cases will never close since each individual case will require constant monitoring and modification.

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[17] E.g. in the case of a health and welfare plan in which eligibility continues.

[18] E.g., in the case of a pension plan where the employee may lose some eligibility credit in short term disability, but receives workers' compensation benefits in lieu of a pension in permanent disabilities.

The net result of such a suggested change in the Act is to interject a procedural complication which requires a factfinder to engage in valuation of one or more benefits not only in the calculation of wages prior to the injury, but also with respect to wage earning capacity thereafter, each time it may change. While that type of busywork may have the benefit of absorbing the idle hours of the multitude of lawyers entering the practice, the violence it would do to the purpose of the Act is obvious.

CONCLUSION

The purpose of the Act was to provide a rapid and defined statutory remedy to workers injured in industrial accidents. Injection of the tort approach of computing values lost to the employee will destroy the system's ability to accomplish that goal. The decision of the Court of Appeals therefore must be reversed.

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APPENDIX A

COM-P-6
X COM-P-6-8
X COM-P-6-8, Sec. 2(13)
X COM-P-6-8, Sec. 10
X ADM-8-4

U.S. DEPARTMENT OF LABOR
Wage and Labor Standards Administration
Bureau of Employees' Compensation
Washington, D.C. 20211

June 17, 1968

LS/HW PROGRAM MEMORANDUM NO. 32
SUBJECT: Computation of Pay Rates –
Fringe Benefits –
LS/HW Compensation Act - Sections 2 (13) and 10

Quoted below is the Associate Solicitor's advisory opinion of March 18, 1968:

> "You ask whether pensions, dental care, medical care, and other fringe benefit contributions by employers should be included in computing the average weekly wage for computation purposes.
>
> "Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act reads as follows:
>
> > " 'Wages' means that money rate at which the services rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

"We feel that it would be improper to assert the inclusion of pension and health plan contributions by the employer

in computing wages though there is support for including such contributions in wages. *United States v. Carter* 353 US 210 (1957) concerned the extent of the liability on a payment bond furnished by a contractor, as required by the Miller Act, for the protection of persons supplying labor for the construction of federal public buildings. The collective bargaining agreement under which the laborers were hired obligated the contractor to pay 7½ cents per hour to the trustees of a health and welfare fund established for the benefit of the laborers. It was expressly stated that the contributions 'shall not constitute or be deemed to be wages' due the employees. The Court stated that 'the parties have stipulated what contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. That the unpaid contributions were a part of the compensation for the work to be done by Carter's employees is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective bargaining agreements'.

"In *Inland Steel Co., v. NLRB,* 170 F.2d 247 (1948), it was held that pension payments by the employer were wages as well as 'other conditions of employment' within the meaning of the National Labor Relations Act.

"In Senate Report 963, 88th Cong., Second Sess., regarding amendments to the Davis-Bacon Act, at page 3, it was said that 'regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation'.

"Payments to these funds are not only a substitute for direct wage increases which workers would otherwise have received; but, in addition, these payments are now a very large part of the hourly wage costs for the industry. A

typical Longshore agreement reveals a basic wage of $3.50 per hour, and welfare and pension fund contributions of $.83 per hour.

"In *United States v. Embassy Restaurant*, 359 US 29 (1959), the Supreme Court held that contributions by an employer to a union welfare fund which were required by a collective bargaining agreement were not entitled in bankruptcy to priority as being 'wages . . . due to workmen' under the Bankruptcy Act. The contributions were flat sums of $8 per month for such workmen, without relation to their hours, wages, or productivity. Because they were due to trustees not to workmen, the court ruled that these unpaid contributions were not wages due to workmen. A strong dissent was registered. The Longshore Act does not require that the wages be due to the employee; thus mitigating this case as authority for the present situation.

"However, other factors and policy considerations must lead us to the view that we should not include employer contributions to pension funds and for other fringe benefits in computing the average weekly wage rate.

"In determining the wage paid to employees with regard to the Fair Labor Standards Act, which defines wages as including the reasonable cost to the employer of furnishing the employee with food, lodging or other facilities, reference should be made to the letter from the Administrator of May 22, 1967, which says:

> 'As pointed out in section 531.32; other facilities are used in section 3(m) must be something like board and lodging. Contributions to pension plans or group life, disability, or other insurance plans do not constitute the reasonable cost or fair value of facilities furnished which may be credited under section 3(m) of the act toward the applicable minimum wage which section 6 requires to be paid free and clear on the pay day for each workweek'.

"Note however, that the FLSA requires that the wages be paid 'free and clear,' while the Longshore Act does not contain such an express requirement.

"Before 1964, fringe benefit contributions were not part of wages under the Davis-Bacon Act. Since it was generally felt that such contributions should be part of wages, Congress passed an amendment to the Act including them as such.

"In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. Since we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices".

/s/ _____
John J. Newman
Assistant Director, LS/HW

Distribution List No. 8 (9/1/65)

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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Supreme Court Rules, the National Association of Stevedores respectfully moves for

leave to file the attached brief as *amicus curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief. Counsel for respondent Hilyer has not.

STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL ASSOCIATION OF STEVEDORES

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005 (b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 64 private marine terminal and stevedore employers and their subsidiary companies doing business in ports on the nation's four seacoasts and the states of Hawaii, Alaska and the Commonwealth of Puerto Rico. Based upon U.S. government manhour statistics it is conservatively estimated that NAS member companies are responsible for over 75 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor entitled to compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act, (the "LHWCA"), 33 U.S. § 901 *et. seq.* The NAS member companies are directly responsible for workers' compensation payments under both federal and state law either

as self-insured or through insurance carriers licensed by the U.S. Department of Labor or state insurance companies. Thus, the interest of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured workers.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and the amount of such benefits, has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Court of Appeals and in this Court in *Northeast Marine Terminal Corp.* v. *Caputo et al.*, 432 U.S. 249 (1977), *Edmonds* v. *Compaignie Generale Transatlantique*, 443 U.S. 256 (1978), and *P. C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979). In addition, this Court granted permission for the National Association of Stevedores to file a brief *amicus curiae* in support of the petition for *writ of certiorari* in this proceeding.

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured longshoremen. *Amicus curiae* does not believe that the parties have considered the issue before this Court in pre-

cisely the same manner, especially as to the funding and operation of pension and welfare funds, and therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

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November 18, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE

THE STATUTE INVOLVED

This case involves the proper construction of sections 2(13) and 9(e) of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §§ 902(13) and 909(e), which provide as follows:

> SEC. 2. (13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.
>
> SEC. 9. (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

THE QUESTION PRESENTED

The question presented to this Court, simply stated, is whether employer contributions made to union pension and/or welfare funds pursuant to collective bargaining agreements are "wages" within the meaning of section 2(13).

SUMMARY OF ARGUMENT

The Court below erroneously overturned over 50 years of administrative interpretations and administration of sec. 2(13) of the LHWCA, and in so doing exceeded its judicial powers. The Court ignored the legislative, administrative and practical understanding of the term

"wages" and, in effect, engaged in legislating an amendment to sec. 2(13), an amendment the Congress has not made since 1927. In addition, the Court erroneously concluded that the amount of employer contributions to union pension and welfare trusts are a "reasonable measure" of the value received by an employee as "wages." The fact is that such contributions are not equal to the value an employee may ultimately receive from a pension or welfare trust. Pension and welfare contributions are subject to ERISA and MMPAA of 1980, which federal laws clearly show that employer contributions are not wages; were never intended to be wages; and do not equate to "value received" by the employee. *Amicus curiae* submit that the decision of the Court below is in error both as to the law and the facts, and must be reversed.

THE FACTS

From November 1972 until he was fatally injured while performing construction work in the District of Columbia in April 1974, James H. Hilyer was employed by petitioner Morrison-Knudsen Construction Company. Under the collective bargaining agreement in effect during that time, for each hour that each employee worked, Morrison-Knudsen was required to pay 28 cents into a health and welfare fund, 35 cents into a pension fund, and 5 cents into a training fund. These funds provide employee benefits such as life insurance, health insurance, retirement benefits, and career training. The contributions were made directly to the trust funds, not the employees, and the individual employees had no role in the fund's management.

After Hilyer's death the company began paying death benefits to his widow, respondent Sonia Hilyer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("the LHWCA"), 33 U.S.C. § 901 *et*

seq., which is made applicable to employment in the District of Columbia by D.C. Code Ann. § 36-501 (1973). Under 33 U.S.C. § 909, the weekly death benefit due respondent Hilyer was 66⅔ percent of her husband's average weekly wage as determined under 33 U.S.C. § 910.

Respondent Hilyer disputed the amount of the benefits being paid her, contending, *inter alia*, that calculation of her husband's "average weekly wage" erroneously failed to include his employer's contributions to the three union trust funds. An administrative law judge rejected her contention, and the Benefits Review Board affirmed that portion of his order.

On appeal to the United States Court of Appeals for the District of Columbia Circuit pursuant to sec. 21 of the LHWCA, 33 U.S.C. § 921, that Court reversed the Benefits Review Board, stating:

> In conclusion, it is clear that if the value received by the employee is reasonably identifiable and calculable then it must be included in the average weekly wage of the employee. We hold that the fringe benefits at issue here amount to value received by the employees, and that it is reasonable to measure such value by the amount of the employer's contribution to the various fringe benefit funds. *Hilyer* et al. v. *Morrison-Knudsen Construction Company et al.* 670 F.2d 208, (D.C. Cir.-1981).

For the following reasons, *amicus curiae* submits that the decision of the Court of Appeals is wrong and should be reversed.

ARGUMENT

A. Purpose of the Act

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, 44 Stat. 1424 (the "LHWCA") was enacted in 1927 to provide workmen's compensation for longshoremen and harborworkers injured on navigable waters, *Northeast Marine Terminal Co., Inc. et al.* v. *Caputo et al.*, 432 U.S. 249 (1977). That original act contained the same definition of "wages" as that now set forth in sec. 2(13) of the LHWCA, 33 U.S.C. § 902(13), the meaning of which is the issue before the Court in this proceeding. Although the LHWCA has been amended several times since 1927, the definition of "wages" in sec. 2(13) has never been changed by Congress.

The primary purpose of the Congress in enacting the LHWCA was to provide a federal workers compensation law for longshoremen injured over navigable waters because this Court in a series of decisions between 1917 and 1924 culminating in *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924) held that such coverage could not be provided by state laws and that the attempts of Congress to authorize such coverage under state laws were unlawful delegations of congressional authority. Compensation to injured workers and their survivors was set at a percentage of the worker's "wages" subject to specific *maxima* and *minima*, 33 U.S.C. §§ 906, 909, and 910. In 1927, longshoremen's wages were paid daily for hours actually worked that day, or on a weekly basis if the longshoremen were able to work steadily for a week. Sec. 10 of the LHWCA provided then, and still does today, for alternative methods of calculating the average weekly wage of the individual longshoreman seeking compensation benefits.

In 1927 the calculation of "wages" was rather uncomplicated, because at the time hourly wages, then 80 cents,

were the only remuneration paid to longshoremen at Atlantic ports, Gulf ports and Great Lakes ports. Although the legislative history of the 1927 enactment is silent on the definition of "wages" in sec. 2(13), a clear reading of the definition is that the term "wages" means only money, or the monetary value of board (food), rent, housing, lodging or similar advantage *received* by the employee from his employer or a gratuity received from others in the course of his employment. In 1927 as to longshoremen, the main beneficiaries of the LHWCA, that meant the hourly wage of 80 cents.

B. History of "Wage" Agreements in the Stevedore Industry

The first departure from the hourly wage in any contract for longshoremen on the Atlantic Coast was in 1945, some 18 years after enactment of the LHWCA. In 1945 employers agreed to pay 3.5 cents per hour as "vacation pay" against an hourly wage rate of $1.50. In 1948 a welfare and disability *contribution* was added at the rate of 2.5 cents per hour. Finally, in 1950, some 23 years after enactment of the LHWCA, pension *contributions* entered into labor management contracts. In 1950 the straight time hourly wage was $1.48; the welfare *contribution* 4 cents; and the pension *contribution* 5 cents.

Hourly wages and vacation and/or holiday pay are different than pension and welfare *contributions* paid by the employers. The only common element is that the employer's payments are measured by man hours worked, but in some instances employer contributions set forth in current collective bargaining agreements are based on the tonnage (amount of cargo handled) rather than manhours. Hourly wages, vacation and holiday pay set forth in the various collective bargaining agreements are readily identified; are taxable income to the employee; are stated on the employer's W-2 form filed by the employer with the Internal Revenue Service; and *are* considered as "wages" within the meaning of sec. 2(13).

Unfortunately, and *amicus curiae* submits, erroneously the Court of Appeals for the District of Columbia circuit in *Hilyer*, 670 F.2d at 211-13, and lately the Court of Appeals for the Ninth Circuit in *Duncanson-Harrelson Company et al.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor*, —— F.2d ——. Nos. (A 79-7093, and 79-7094 decided September 14, 1982) determined that the term "wages" in sec. 2(13) "includes the values received from the employer that are easily identifiable and calculable", and that employer contributions to unions health and pension funds are to be included as "wages" received by the employee.

C. Employer Contributions to Union Trust Funds Are Not "Wages"

Stevedore employer contributions, funding, or assessments into unions trust funds are not wages. They are not taxed by the Internal Revenue Service, and are not reported on any W-2 Form. Other than certain payments, such as holiday and vacation pay, some royalty payments (all of which are reported to the Internal Revenue Service on W-2 Forms), the amount of employer payments into the various union trust funds bears little relationship to the amount paid out by those trust funds to individual employees. The funding of such trust funds and disbursements therefrom are governed by and subject to (1) the individual trust fund documents, (2) actions taken by the fund trustees and (3) actuarial assumptions, all of which are subject to the provisions of the Employee Retirement Income Security Act (ERISA) 29 U.S.C. 1001 *et. seq.*, 88 Stat. 829, and more recently the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1001a *et. seq.*, 94 Stat. 1208.

Although many collective bargaining agreements in the stevedoring industry provide for employer payments or contributions to several trust funds jointly administered

by management and union selected trustees, whose obligations and duties are set forth in the trust agreement *not* the collective bargaining agreement, further discussion herein will be limited to pension and welfare funds, all of which are subject to ERISA and MPPAA. Each pension and welfare trust agreement sets forth the eligibility and vesting requirements of benefits of the individual employee, *not* the collective bargaining agreement. Some plans provide for the employee receiving credit towards his vesting and eligibility requirements in the event of injury for the duration of the injury or a shorter period. Some plans provide for life insurance in the event of death. Some plans continue medical and welfare benefits to survivors of deceased workers. Some plans provide for dental care or eye glass replacement. Some plans include benefits paid for past service to employees who have already retired from the work force. Those past service benefits are paid in part from employer contributions based on active worker man hours.

The *value* of the employer's funding of benefits cannot be ascertained from the employer's contributions to the plan, especially a multiemployer plan, nor from the collective bargaining agreement. An individual employee's share or value of each plan must be ascertained on an individual basis, and that can only be done by plan or fund trustees, actuaries and counsel.

D. Employer Contributions to Union Trust Funds Are Not a Reasonable Measure of Value Received by an Employee

If employer contributions to pension and/or welfare trusts were sure and accurate measures of the value received by the employee from the employer there would have been no need for Congress to enact ERISA in 1974. As Congress found, many employees do not receive agreed upon pension and/or welfare benefits because of (1) fund vesting requirements, (2) underfunding of trusts so that

the funds are unable to pay agreed upon benefits, or (3) plan terminations, 29 U.S.C. § 1001. So ERISA was enacted in an attempt to protect employee retirement and other benefits, but nowhere in ERISA did Congress indicate that it intended that the contributions paid be treated as "wages."

Congress amended ERISA in 1980 by enacting the MPPAA of 1980 with respect to the termination of multiemployer pension plans and to add further protection to workers in the event of employer withdrawals from plans or from plan terminations, 29 U.S.C. § 1001a. Again, as in 1974, Congress did not indicate that "wages" and pension plan contributions were the same, or were to be treated as the same in any respect. Congress well realized that there is a significant difference between the two. Congress' only concern was to insure that employer contributions were adequate to pay promised benefits to *eligible* employees. The mechanisms for funding the various plans were for the employers to decide, and the benefits to be paid were for the plan trustees to decide, subject to minimum vesting standards, 29 U.S.C. § 1053, and minimum funding standards, 29 U.S.C. § 1082.

The complexity of secs. 1053 and 1082 clearly demonstrate that the amount the employer contributes to any union trust fund in any one year predicated on an employee's manhours worked has no readily ascertainable relationship to the value which that employee may ultimately receive. For example, if an employee were to die or leave the employment prior to the vesting of benefits that employee would by law receive no value from the contribution.

Amicus curiae submits that Congress clearly demonstrated by its legislative actions in the LHWCA, ERISA and the MPPA that employer contributions to union pension and welfare trusts are not "wages" and were never

intended to be treated as such. Such contributions are merely a means to fund the variety of obligations established in the trust fund agreement.

E. Administrative and Judicial Interpretations of "Wages"

Until the decision of the Court of Appeals for the District of Columbia in *Hilyer* the Department of Labor which administers the LHWCA consistently excluded employer contributions to union premium and welfare funds in the calculation of an injured worker's "wages". Until the *Hilyer* decision no court since 1927 determined that such employer contributions were "wages" of the employee. Only once, in *Hilyer*, did a representative of the Department of Labor depart from the long held departmental position, but shortly thereafter the Director, Office of Worker's Compensation Program admitted the error made in *Hilyer*, and returned to the long held departmental position, *Duncanson-Harrilson Company et. al.* v. *Director, Office of Workers' Compensation Programs, supra.*

Over 50 years of consistent administrative and judicial interpretations of the term "wages" was, we believe, erroneously overturned by the court in *Hilyer* because it did not understand the true nature of employer contributions to pension and welfare trusts, and that benefits funded by such contributions do not directly correlate to the benefits the individual employee will ultimately receive. The decision of the court below is not a judicial interpretation of legislation, but is an attempt to amend legislation. That is a function of the Congress not of the courts, *Director, Office of Workers' Compensation Program et. al.* v. *Rasmusson et. al.*, 440 U.S. 29 (1978),[1] and therefore, must be reversed.

---

[1] "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a line.' Our task is to interpret what Congress has said; . . .". *id.* at 47.

F. The Disastrous Effects of Hilyer

If the decision in *Hilyer* is not reversed, and if employer contributions to various pension and welfare trusts are to be included in the computation of "wages" under the LHWCA, employers subject to the Act could well be forced into bankruptcy and the administrative process collapse under the weight of endless litigation involved in new cases and cases reopened pursuant to sec. 22, 33 U.S.C. § 922.

For example, stevedore employers on the Pacific Coast, parties to the collective bargaining agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union (ILWU) would be obliged to add to the $13.52 hourly wage for longshoremen an additional $4.46 in pension and welfare fund contributions. That is an increase of 33 percent in the compensable hourly "wage." Under the terms of the several collective bargaining agreements between various shipping associations and the International Longshoremen's Association (ILA) in effect on the Great Lakes, Atlantic, and Gulf Coasts employer contributions to pension and welfare funds range from $2.91 to $6.80 against an hourly wage of $12.80 for longshoremen. Those are increases ranging from 22 percent to 53 percent in compensable hourly "wages."

If the employer contributions are included as "wages" an injured longshoreman on the Pacific Coast could receive in tax-free LHWCA benefits $478.98 per week (⅔ x $13.52 + 4.46 x 40 hrs.), which amount will exceed his "wages" when working ($540.80 per 40 hour week) less state and federal income taxes. At the same time the injured employee continues to earn credits towards retirement and other welfare benefits. The incentive to return to work when able, a major cornerstone of any workers' compensation program, is thus destroyed. There is no longer any incentive to return to work for taxable wages. The same result will appear on the Great

Lakes, Atlantic and Gulf Coasts where employer contributions to pension and welfare trust averaged over $4.00 in 1981 against a base wage rate of $12.80.

In addition to the expected increase in litigation over what is or is not "wages" for each employee in every compensation case filed under the LHWCA, litigation will surely arise over which pending or closed LHWCA cases are subject to applications for modification pursuant to sec. 22, 33 U.S.C. § 922. For the foreseeable future both the Department of Labor and employer/carriers subject to the LHWCA will be inundated with sec. 22 modification applications as well as newly created litigation over what items are "wages" and what items are not, as no collective bargaining agreement or trust fund agreements are precisely the same.

Litigation can be easily forecast over the issue of pension or welfare fund payments which are actually paid to injured workers or their survivors being offset or deducted from LHWCA compensation payments. For example, should a survivor enjoy life insurance payments from the trust fund plus the value of the cost of obtaining such insurance? Another clear ground for new litigation is the question of whether an injured employee, who under the trust agreement continues to receive credit for vesting and pension payments upon retirement, should at the same time receive the value of employer contributions designed to fund such benefits. In short, under a *Hilyer-type* ruling may the employee or his survivor receive both the trust fund benefit and the cost of purchasing the benefit? If this Court affirms the rule in *Hilyer* then ultimately this Court and the several courts of appeals will soon be faced with endless litigation over the issue of double recovery, retroactivity, and the true value of pension and welfare funding.

One final issue which will require resolution is the question of employer contributions to "defined benefit plans" in which the collective bargaining agreement does

not set forth the amount of employer contributions, such as the Pacific Maritime Association-ILWU agreement. Under such agreements the benefits are agreed upon and the employers later, without employee participation, decide amongst themselves the appropriate means and funding levels necessary to meet the collectively bargained trust fund agreements. That issue is not now before this Court, nor was it before the Court below in *Hilyer*, but it soon will be.

The potential for endless and complex litigation that will arise if over 50 years of settled and consistent interpretation and administration of sec. 2(13) is allowed to be overturned as the Court below has done in *Hilyer* is tremendous, and the added cost to employer/carriers, the system, the Courts, and the Department of Labor is inestimable. Indeed, the system and the industries subject to the LHWCA may collapse under the combined weight.

CONCLUSION

For all the reasons set forth above, *amicus curiae* National Association of Stevedores, urges this Court to reverse the decision of the Court below.

Respectfully submitted,

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OCTOBER TERM, 1982

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AND APPENDIX OF AMICUS CURIAE, NATIONAL COUNCIL OF SELF-INSURERS IN SUPPORT OF PETITIONERS

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---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND APPENDIX

Pursuant to Supreme Court Rule 36, The National Council of Self-Insurers respectfully moves for leave to file an Amicus Curiae Brief and Appendix in support of the petitioners. Counsel for petitioners and the federal respondent have consented to the filing of this brief. Counsel for respondent Hilyer has refused to consent.

The movant, National Council of Self-Insurers (the "National Council"), is an unincorporated trade association comprised of over 300 member companies and state associations including hundreds of additional self-insured companies. The membership of the National

Council is a representative cross-section of American enterprise including the steel, aluminum, automobile, utility, manufacturing, retailing and service industries. The members employ more than two million people, most of whom are covered by various federal and state workers' compensation statutes. The most recent data indicate that self-insured companies paid $2.1 billion in total compensation benefits under state and federal workers' compensation programs.

Self-insurers have a unique economic and financial stake in the LHWCA. The National Council will explain the substantial costs that its broad-based membership has incurred due to the expensive benefit levels enacted by Congress in the 1972 amendments to the LHWCA. The National Council can demonstrate significant financial hardship upon its members if fringe benefits are included in wages. In recent years, the liberal benefits enacted in the 1972 Amendments to the LHWCA and the resultant meteoric rise in compensation costs and claims have threatened the well-being of the entire program. While struggling under these burdens, self-insurers alone have experienced a 1,337% increase in LHWCA benefits paid in the last eight years. In 1981, self-insureds paid approximately 42% of the total cash indemnity benefits, *i.e.*, $80.6 million, received by claimants under the LHWCA. Thus, the National Council represents a most significant force in all workers' compensation programs in the United States.

The National Council agrees with the petitioners and the federal respondent that the United States Court of Appeals for the District of Columbia Circuit has again erroneously tampered with the core of the LHWCA in creating a new benefit structure, *i.e.* including fringe benefits into an employee's wages, which is neither permitted by the Act nor by the 55 years of administrative and judicial application of its wage-based formula. Although the parties and the various *amici* have addressed many aspects of the case, the National Council's Brief

discusses several additional issues which have not yet been presented and which merit consideration by this Court as being essential to a proper disposition of this case.

First, the National Council's Brief discusses heretofore undisclosed legislative history which demonstrates that, despite concrete recommendations by a specially created National Commission to change the wage definition to take fringe benefits into account, Congress in the 1972 Amendments to the LHWCA continued to follow the traditional concept of gross wages. Instead of an indirect fringe benefit approach, Congress in 1972 dramatically and directly increased benefits by raising the minimum and maximum rates of compensation.

The National Council has determined that a further increase in LHWCA benefits of at least 26 to 38%, *i.e.* $20-30 million, would have to be paid by self-insured employers in 1981 alone if the *Hilyer* decision is upheld. These additional costs would be directly contrary to the legislative compromise which the LHWCA struck between employers and employees that is essential to a sound workers' compensation program. Claimants would receive compensation benefits in excess of net pay. There certainly would be extensive litigation and delay attendant to unravelling those fringe benefits that are "reasonably calculable" under the *Hilyer* redefinition of "wages" and those that are not.

Second, the National Council's Brief demonstrates the costly problems associated with the *Hilyer* redefinition of wages which will foster uncertainty, delay, expense and litigation, thereby undermining the two essential elements of the LHWCA and its present wage formula, *i.e.* prompt and voluntary payment of fixed, precisely calculated benefits. Double payment of fringe benefits under the *Hilyer* decision would result in a work disincentive contrary to the purpose and intent of the LHWCA. However, if the "value received" rationale fashioned by the Court of Appeals is affirmed herein,

then "wages" should be limited to net after-tax earnings, under *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980). The fringe benefit concept may also conflict with the Employee's Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (ERISA). A full explication of these issues will aid this Court in obtaining a proper resolution of this case.

The National Council of Self-Insurers considers this case to be a matter of such fundamental concern that it is seeking, for the first time in its history, leave to file an amicus brief with this Court. The National Council is greatly troubled by the delay and litigation which will follow the *Hilyer* rule and which will create an intolerable hardship on its many employees who are supposed to receive prompt payment of their compensation benefits. Although attorneys may look forward to the potential fees from the litigation that will be necessary to determine how the sweeping *Hilyer* rule will be applied, our employees need prompt determination of their compensation rights and return to their productive lives in our society.

The National Council of Self-Insurers respectfully requests that the Court grant the aforegoing Motion for Leave to File a Brief and Appendix as Amicus Curiae in support of the Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,

v. *Petitioners,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AND APPENDIX OF AMICUS CURIAE NATIONAL COUNCIL OF SELF-INSURERS IN SUPPORT OF PETITIONERS

The National Council of Self-Insurers, appearing as *amicus curiae* in support of petitioners, urges reversal of the judgment below.

SUMMARY OF ARGUMENT

Contrary to 55 years of uniform administration of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter "LHWCA"), the decision below holds that employer contributions to three union benefit plans constitute "wages", as defined in the Act, and thus must be included as part of the employee's average weekly wage in computing benefits. *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (D.C. Cir. 1981). Whatever surface plausibility may exist for such an expansive interpretation, it is completely unwarranted by the language of the statutory definition or the context in which it has been consistently applied since 1927. *Hilyer* fails to appreciate that its unprecedented introduction of variables and contingencies into the wage-based calculation is wholly at odds with the settled administration of the LHWCA, which depends upon certainty and the prompt, voluntary delivery of benefits. It ignores the reality that workers' compensation programs like the LHWCA "do not purport to provide complete compensation for the wage earner's economic loss." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281 (1980).

Although employer-funded benefit plans were unknown in 1927, when LHWCA "wages" were defined, their subsequent rapid growth has prompted pervasive regulatory legislation on the subject. Nevertheless, while concurrently increasing benefit levels, Congress has adhered to the wage-based formula despite awareness that benefits are calculated on the basis of gross pay, without regard to employer contributions to future benefits. Before adopting the 1972 Amendments to the LHWCA, Congress gave careful consideration to the report of a National Commission. One recommendation would have made allowance for such employer contributions to fringe benefits, but Congress deliberately elected to adhere to the traditional formula.

Congress also declined to adopt another Commission proposal which contemplated after-tax "spendable earn-

ings" as the most equitable basis for calculating LHWCA benefits. However, if *Hilyer* turns out to be a tolerable construction of the statute, the same considerations addressed in *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980), would require a holding that after-tax earnings provide the only realistic measure of a worker's average weekly wages.

Moreover, *Hilyer* could adversely affect all parties concerned with the administration of the Act. Members of the National Council of Self-Insurers employ in excess of two million workers in the major areas of the United States workforce. These self-insurers are bearing a disproportionate financial burden under the LHWCA, as amended in 1972. They have seen a 1,337% increase in LHWCA cash indemnity payments made during the last nine years, which totalled $80.6 million in 1981. The new wage definition of *Hilyer* would have added an increased cost of LHWCA benefits to self-insurers estimated at 26-38%, i.e., $20-30 million, in 1981 alone. This increase in benefits authorized by the Court of Appeals is contrary to the intent of Congress. The application of *Hilyer* will increase litigation thereby preventing prompt payment of benefits to all employees under the Act.

If further demonstration is needed that *Hilyer* is a step in the wrong direction, the very existence of ERISA argues strongly against the unpredictable extension of the LHWCA into the realm of benefit plan funding. The decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), as recently applied by the Second Circuit suggests that predicating workers' compensation liability upon the level of plan funding may run afoul of ERISA in several respects discussed herein. Since this Court will explore again this term the inherent tension between ERISA and disability compensation statutes, *Kramarsky v. Delta Air Lines, Inc.*, 102 S. Ct. 1968 (1982) (noting prob. juris.), sound judicial policy requires a circumspect approach to the LHWCA which will avert a collision course with another Congressional program.

ARGUMENT

I. JUDICIAL TAMPERING WITH THE WAGE-BASED FORMULA FOR MEASURING LHWCA BENEFITS, IN UNPRECEDENTED DISREGARD OF SETTLED ADMINISTRATION OF THE ACT, CREATES UNCERTAINTY WHERE NONE NOW EXISTS.

Once again, the United States Court of Appeals for the District of Columbia Circuit has superimposed its subjective notions of reasonableness and social welfare upon the law of workers' compensation. In *Potomac Electric Power Co. v. Director, OWCP*, 606 F.2d 1324 (D.C. Cir. 1979), citing "humanitarian objectives" and recent trends, it misconstrued the LHWCA as providing a "remedial alternative" measure of compensation whenever scheduled benefits prove "inadequate". *Id.*, at 1327-28. This Court reversed. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980).

In *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), the same Court held that when "something unexpectedly goes wrong with the human frame" of a worker, even when awaking in his own bedroom, it satisfies the LHWCA's definition of a compensable "injury". *Id.*, at 458. Again, this Court reversed. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 102 S. Ct. 1312 (1982).

Now, in its latest rendition of the LHWCA, 55 years after its enactment, the Court of Appeals for the District of Columbia Circuit has decided that statutory "wages" ought to be expanded to include the value of contingent benefits, which depend upon future eligibility and are supplemental to wages. It held that an employer's negotiated costs of funding union pension and welfare plans "amount to value received" by employees and "must be included as part of the employee's average weekly wage in computing the compensation due under the Act." *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (D.C. Cir. 1981).

The *Hilyer* decision must be reversed because it undermines the core assumption that all LHWCA benefits are calibrated to statutory "wages", not to indirect "values" conferred by the employment. Section 2(13) of the LHWCA, unchanged since 1927, provides:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13). Not a single word in that definition has been changed, added, or deleted since the LHWCA was enacted. State workers' compensation programs, also linking benefits with past "wages", have been functioning even longer. All of them are pragmatic endeavors, designed simply to provide certain and prompt benefits. These systems look to the previous "wages" on which the worker and family actually lived and assign a practical meaning to that term.

Section 2(13) of the LHWCA defines "wages" to embrace all cash earnings (wages, salaries, and tips), plus any tangible necessities (room, board, or similar advantage) actually received from the employer, directly and unconditionally. Those are the "wages" on which the worker and his family once depended. Upon his death or disability, all LHWCA benefits are measured by the average weekly "wages" no longer received. 33 U.S.C. § 910.

It is astonishing that the Court of Appeals would announce, in essence, that benefits have been miscalculated for more than half a century. For much of that period, noncontributory fringe packages have afforded group protection to workers against various contingencies. While a worker is alive and well, however, the "value" of such protection lies in the future, after he is no longer able to earn "wages". The cost to his employer forms no part of

his family's current standard of living and confers no personal right to receive any portion of the sums contributed on behalf of the group. By equating "values" never received by an employee during his work-life with the "wages" which he did receive, the Court of Appeals has supplied a novel meaning to a statutory definition which has controlled every LHWCA benefit determination since 1927.

That Court's unprecedented notion that "wages" defined by the LHWCA includes "values" beyond "wages" represents yet another "recent development surfacing for the first time almost 50 years after its enactment." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 279 (1980). The suggestion that the employer cost of fringe benefits should be factored into "average weekly wages" never surfaced before because nobody associated with the LHWCA, including claimants and their resourceful attorneys, perceived in it any merit. Since workers covered by the LHWCA are often employed pursuant to collective bargaining agreements exacting such employer contributions, a fact of which Congress has been aware for decades,[1] the lack of any judicial or administrative precedent for the contention should have argued forcefully against its belated adoption.[2]

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[1] Indeed, the 1972 Amendments to the LHWCA contained an explicit reference in § 17(b) thereof to trust funds which comply with 29 U.S.C. § 186(c) and are established by a collective bargaining agreement, as authorized by the Labor Management Relations Act of 1947. *See* 33 U.S.C. § 917(b). Since 1947, Congress has legislated pervasively with respect to employer-funded pension and welfare plans. *See* Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. § 301, *et seq.*, Employee's Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

[2] In its futile quest for precedential support, the Court of Appeals turned to the state level, where reported opinions dealing with every aspect of workers' compensation laws are truly voluminous. It managed to find a single opinion lending support to its position that employer contributions should now become part of weekly wages in calculating compensation benefits. *Hite v. Evans Products Co.*,

The Court of Appeals treated the contention as raising "a question of first impression" which "has apparently not been addressed before." 670 F.2d at 209, 211. That observation was not entirely accurate. Even before the 1972 Amendments to the LHWCA, the Department of Labor felt "bound by [the] past practice of excluding those fringe benefits from wages" and reported that any departure from that practice "is up to Congress" to prescribe.[3] Following those Amendments, which left intact the "wages" definition as well as the "average weekly wages" formula, the Benefits Review Board has adhered repeatedly to the position that employer-paid fringe benefits are not included in wage calculations.[4] More significant is the frequent application of departmental policy in routine claims adjudication. Because the Department of Labor, upon request of any claimant or employer, provides information and assistance relating to LHWCA

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34 Mich. App. 247, 191 N.W.2d 136, 139 (1971). Apart from Michigan legislation which nullified *Hite* by excluding "any fringe or other benefits" from "average weekly wage" determinations, *id.*, 191 N.W.2d 136, 138 n.2, *Hite's* precedential value is offset by subsequent decisions to the contrary in *Still v. Industrial Commission*, 27 Ariz. App. 142, 551 P.2d 591, 593-94 (1976), and *Sunland Training Center v. Irving*, 384 So.2d 745 (Fla. App. 1980). No court of final result has ever addressed the issue resolved below.

[3] *See* U.S. Department of Labor, Bureau of Employees' Compensation, Wage and Labor Standards Administration, LS/HW Memorandum No. 32 (June 17, 1968), p.3, reprinted in appendix to American Insurance Association Amicus Br. Supporting Pet. for Cert., pp. 1a to 4a.

[4] In addition to *Hilyer* itself, the Benefits Review Board rejected arguments that LHWCA wages include employer costs of fringe benefits in *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981) (appeals pending in 5th Cir., Nos. 81-4258 and 81-4273); *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), *rev'd sub. nom., Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1343-46 (9th Cir. 1982); *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977). Following *Hilyer*, the Board has reversed its own position, *Minick v. Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), reconsideration granted (July 29, 1982).

coverage and compensation, 33 U.S.C. § 939(c), thousands of claims have been resolved upon the official assurance that employer contributions to fringe benefits are not part of average weekly wages.[5]

Without a firm grasp of legislative history or administrative practice, the Court of Appeals treated Section 2(13) of the LHWCA as an invitation to search for hidden implications not apparent to those who enacted or administer the law. It found that the "wages" definition "clearly implies that the values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage." 670 F.2d at 211. By isolating the "wages" definition from the rest of the LHWCA the Court of Appeals created an elastic meaning which embraced any benefit, however contingent, having "substantial economic value to the employees." *Ibid.* That conclusion was attributed to *dicta* in *United States v. Carter*, 353 U.S. 210 (1957), which actually held that union fund contributions enjoy protection under a Miller Act bond because that "Act . . . does not limit recovery on the statutory bond to 'wages' ". *Id.*, 353 U.S. at 217.[6]

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[5] The Court of Appeals relied on views since repudiated by the Department of Labor. Federal Respondent's Br. Supporting Pet. for Cert., p. 4 n.2. The Department was unsuccessful in urging the Ninth Circuit to reject *Hilyer*. *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1343 (9th Cir. 1982).

[6] *See United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 34-35 (1959), distinguishing *Carter* and giving a construction to the term "wages" which *Hilyer* found "inappropriate here." 670 F.2d at 213.

Hilyer is perhaps the only significant LHWCA decision resting exclusively upon judicial opinions that addressed no aspect of the Act. Even this insecure reliance was badly misplaced. For example, the Court of Appeals stated unequivocally that *W. W. Cross & Co., Inc. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949), *"held* that *contributions* to a group health insurance plan were 'wages' for the purposes

The Court of Appeals rationalized its expansive treatment of "wages" upon an assumption that Congress intended to include all identifiable values in wage calculations:

> * * * The purpose of the Longshoremen's Act is to provide prompt compensation for injured employees or their families. Congress chose to carry out this design by including in the compensation formula *all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of the injury. * * *

670 F.2d at 213 (court's italics). Having characterized employer contributions as "valuable benefits, *in addition to* hourly rates of pay" and as an "important part of the employer's labor *cost*", 670 F.2d at 212 n.7 (italics

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of the mandatory bargaining provision of the NLRA as amended, 29 U.S.C. §§ 151 *et seq.*" 670 F.2d at 211 n.6 (italics added).

However, neither *W.W. Cross* nor *Inland Steel v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950), also cited by *Hilyer*, 670 F.2d at 212 n.6, held anything of the kind. Both cases held that the *benefits* of group plans are "wages" *or* "other conditions of employment", *not* that *contributions* to such plans may be so described.

Any doubt as to the scope of those holdings, and the egregiousness of the *Hilyer* misstatement, was put to rest in *Sylvania Electric Products, Inc. v. NLRB*, 291 F.2d 128 (1st Cir.), *cert. denied* 368 U.S. 926 (1961). Judge Woodbury, who authored the *W.W. Cross* decision, again wrote the unanimous opinion in *Sylvania*:

> The court held in *W.W. Cross & Co. v. NLRB*, *supra*, that the *benefits* of an employee group insurance plan were 'wages' within the meaning of that word as used in the pertinent sections of the Act * * *. We adhere to that decision. * * * It is quite another matter, however, to go further and endorse the * * * conclusion that the *cost* of a group employee insurance program defrayed entirely by the employer also constitutes 'wages' to employees. In the absence of any controlling authority, or indeed, of any judicial authority cited or discovered by our own efforts, we decline to take that step. *Id.*, 291 F.2d at 131 (court's italics). *See also, Western Massachusetts Elec. Co. v. NLRB*, 573 F.2d 101, 109 (1st Cir. 1978).

added), the Court of Appeals held that such expenditures, over and above salaries, easily satisfied its own all-embracing definition of "wages". 670 F.2d at 213.

> In conclusion, it is clear that if the value received by the employee is reasonably identifiable and calculable, then it must be included in the average weekly wage of the employee.

Apart from the demonstrable fact that Congress never intended such a result, and indeed legislated on the assumption that fringe benefits would *not* be factored into the "wages" equation, the *Hilyer* opinion betrays an unwillingness to comprehend the limited objectives of the LHWCA. The unsupportable premise that Congress intended to provide a complete remedy for all economic loss, by reaching "*all* of the identifiable value, in whatever form it may appear", *ibid.*, has been rejected before. In *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980), it was necessary to point out to the same Court of Appeals the "inaccuracy" of assuming "that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries" (449 U.S. at 281):

> The LHWCA, like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a *certain* recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common law defenses that had frequently resulted in the denial of any recovery for disabled laborers. While providing employees with the benefit of a more *certain* recovery for work-related harms, statutes of this kind *do not purport to provide complete compensation for the wage earner's economic loss.* On the contrary, they provide employers with *definite and lower limits* on potential liability than would have been applicable in common-law tort actions for damages. None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only

> two-thirds of the actual loss of earnings. It therefore is *not* correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers. * * *

449 U.S. at 281-82 (italics added; footnotes omitted).

In short, "[t]he LHWCA clearly does not attempt to compensate injured employees for their entire loss." *Id.*, 449 U.S. at 281 n.23. The "value" of the employer's cost of fringe benefits may or may not be regarded as an appropriate component of damages in a tort action. However, the employer's cost, even if identifiable and calculable, is not a proper concern of the LHWCA, in which "the maximum compensation available is expressly designated to be less than an employee's actual economic loss." *Id.* The statutory preoccupation with a worker's average weekly "wage or salary", 33 U.S.C. § 910(a), (b), as the sole basis for calculating all benefits, implies the exclusion of "values" whose worth depends upon future variables and contingencies. The simplicity and ease of administration of excluding intangibles from "average weekly wages" is "consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible." *Id.*, 449 U.S. at 282.

Viewed in the entire context of the LHWCA, the statutory definition of "wages" must be interpreted as a determinate and mechanical formula for calculating benefits, not as a complete remedy for all forms of economic loss. Generally, "the average weekly wage of the injured employee at the time of the injury *shall* be taken as *the* basis upon which to compute compensation" in all death or disability cases. 33 U.S.C. § 910 (italics added). The statutory formula contemplates multiplying "the average daily wage or salary" by the number of

work days per year, 33 U.S.C. § 910(a) and (b), and then dividing the total by 52. 33 U.S.C. § 910(d).

The LHWCA requires the Secretary of Labor to determine annually the "national average weekly wage", 33 U.S.C. § 906(b)(3), defined as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls." 33 U.S.C. § 902(19). The national average is the statutory basis for setting floors and ceilings for all benefit categories. Benefits must be adjusted upward each year in accordance with any increase in the national average weekly wage. 33 U.S.C. § 910(f), (g) and (h).

Obviously, the statutory obligation of compiling a "national average weekly wage" would become an impossible task if the myriad of contingent benefits had to be taken into account. In accordance with historic practice and administrative necessity, the Secretary of Labor has never included employer contributions to benefits in calculating the national average weekly wage. The Secretary's focus upon prevailing salary rates plainly coincides with the Congressional understanding of national average weekly wages. In setting maximum and minimum benefit levels for nonappropriated fund employees under the LHWCA, for example, Congress expressly chose the rates of "basic pay" established by 5 U.S.C. § 5332 for Federal employees. 33 U.S.C. § 906(c). Those flat salary rates, which exclude the value of fringe benefits, are thus treated as equivalent to the "national average weekly wage" formula.

The whole purpose of the LHWCA is to provide a voluntary system of fixed benefits based upon the average weekly wage actually received by the employee. The classic compromise of competing interests, which led to its original enactment and underscores every amendment thereto, rules out judicial embellishments which would set a premium on variables and contingencies. The decision below misconstrued the terms of the LHWCA and the certainty intended by Congress.

II. IN ENACTING THE 1972 AMENDMENTS TO THE LHWCA, CONGRESS RECOGNIZED THAT EMPLOYER CONTRIBUTIONS TO FUTURE BENEFITS ARE NOT INCLUDED IN DETERMINING THE AVERAGE WEEKLY WAGE AND ADHERED TO THAT CONSTRUCTION OF THE ACT.

A. Legislative Background.

Congress has amended the LHWCA ten times since its original enactment in 1927, including a comprehensive revision in 1972, but has not once changed the statutory definition of "wages", 33 U.S.C. § 902(13), or modified "average weekly wages" as the basis of all benefit calculation. That terminology was lifted bodily from the New York Workmen's Compensation Law of 1922, on which the LHWCA was patterned. Although hearings in Congress before passage of the LHWCA were distinctly adversarial in nature, the legislative history is singularly unilluminating. Battle lines were drawn over other topics. The definition of "wages" and concept of "average weekly wages" were adopted without discussion or debate.

When the LHWCA was enacted in 1927, cash wages indeed constituted virtually the only type of remuneration paid to employees. Group life insurance, hospitalization, disability benefits, medical care, pensions, and comparable fringe benefits were essentially unknown before World War II, when it became a widespread practice to substitute them for wage increases. Congress itself has noted this commonplace means of circumventing regulations of the National War Labor Board, which restricted wage increases for the duration of hostilities.[7] Likewise, the development of union pension, welfare, and retirement trust funds, financed exclusively by employer contributions, took place long after the original enactment

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[7] See S. Rep. No. 963, 88th Cong., 2d Sess. (1964), reprinted in 2 *U.S. Code Cong. & Admin. News 1964*, p. 2340; H. Rep. No. 93-533, 93rd Cong., 2d Sess., p. 2 (1974), reprinted in 3 *U.S. Code Cong. & Admin. News 1974*, p. 4640.

of the LHWCA. Congressional reaction was swift.[8] However, as late as 1958, the growth of employer-funded benefit plans during the past decade was described as "phenomenal".[9]

In ascertaining the legislative intent underlying the "wages" definition and "average weekly wages" formulation adopted in 1927, it must be recognized that Congress scarcely could have anticipated these subsequent developments. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 280 (1980). Long after the advent of noncontributory benefit plans, there was strong authority holding that employer contributions to such plans did not constitute "wages" within any generally accepted meaning of that term. *See, e.g., United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959). *Sylvania Electric Products, Inc. v. NLRB*, 291 F.2d at 131. Such payments are referenced to the actuarial needs of the fund, not the money rate of recompense. Employees have no choice as to participation and no option of demanding that the employer's contribution be paid over to them as a substitute for eligibility. *E.g., International Brotherhood v. Daniel*, 439 U.S. 551, 553 (1979).

When uncertainty has arisen whether such employer contributions should be treated as "wages" or not, Congress has not hesitated to eliminate all doubt. In some instances, employer contributions to pension and welfare plans have been specifically exempted from the statutory definition of "wages". Internal Revenue Code of 1954, 26 U.S.C. § 3401(a)(12)(A).[10] In other instances, Congress has seen fit to enact statutory definitions which do

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[8] Section 302(c), Labor Management Relations Act of 1947, 29 U.S.C. § 186(c).

[9] S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), reprinted in 3 *U.S. Code Cong. & Admin. News 1958*, p. 4140.

[10] *See University of North Dakota v. United States*, 603 F.2d 702 (8th Cir. 1979); *Joint School District No. 1 v. United States*, 577 F.2d 1089 (7th Cir. 1978).

classify such employee contributions as "wages". For example, the Davis-Bacon Act of 1931 had to be amended in 1964, 40 U.S.C. § 276a, to include fringes due to the stated belief of the sponsors that such "fringe benefits were unknown when this Act became law a third of a century ago" and that, because "wages" are paid unconditionally, "fringe benefits that are contingent in nature cannot now be included in the wage determinations." [11]

As noted, in the decades following passage of the LHWCA, Congress saw fit to redefine "wages", as used in some other statutes, in order to take account of contributions to pension and welfare plans. And yet it concurrently amended the LHWCA to increase benefit levels without changing the definition of "wages" in that Act.[12] Any complacent assumption that 33 U.S.C. § 902(13) was a flexible catchall, broad enough to accommodate employer contributions, could not possibly have survived this Court's decision in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), or its reaffirmation in *Joint Industry Board of the Electrical Industry v. United States*, 391 U.S. 224 (1968). Both cases proclaimed that such contributions do not have the customary attributes of "wages" and, being owed to trustees and *not* the employees, provided no support to the workmen in periods of financial distress.

B. The 1972 Amendments.

In the wake of those decisions, the Senate Labor and Public Welfare Committee conducted hearings and research which led it to conclude that "workmen's compensation benefit levels do not appear to have kept pace with increasing wage levels and the rising cost of living faced by American workers, with the result that benefits usu-

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[11] See S. Rep. No. 963, 88th Cong., 2d Sess., reprinted in 2 *U.S. Code Cong. & Admin. News 1964*, p. 2340.

[12] Act of June 24, 1948, ch. 623, §§ 1, 3, 62 Stat. 602; Act of July 26, 1956, ch. 735, §§ 1, 4, 70 Stat. 654, 655; Act of July 14, 1961, Pub. L. 87-87, §§ 1, 2, 75 Stat. 203.

ally replace only a small fraction of the income lost to disability, injury or disease." [13] Pursuant to its recommendations, Congress established the National Commission on State Workmen's Compensation Laws and directed a year-long study of the adequacy of existing compensation programs. 29 U.S.C. § 676. The Commission completed its work on time. In reporting the 1972 Amendments to the LHWCA, committees of the House and Senate acknowledged that they had "given the most careful consideration to the recommendations of the National Commission on State Workmen's Compensation Laws contained in its report issued on July 31, 1972." [14]

Many key recommendations contained in the Commission Report for liberalizing monetary benefits were enacted into law: e.g., the elimination of fixed-dollar maximum ceilings on benefits and the substitution of a phased-in maximum set at 200% of the national average weekly wage, 33 U.S.C. § 906(b)(1); provisions in so-called second injury cases to encourage the employment of handicapped workers, 33 U.S.C. §§ 908(f), 944; removal of any cumulative maximum limit on partial disability benefits, 33 U.S.C. § 914; reduction from four weeks to two of the period after which retroactive benefits are payable, 33 U.S.C. § 906(a).[15]

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[13] S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), reprinted in 3 *U.S. Code Cong. & Admin. News 1970*, p. 5200.

[14] The identical language appears in the House and Senate Committee reports. H. Rep. No. 92-1441, 92nd Cong., 2d Sess., p. 2 (1972), Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (prepared for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. 208 (1972) (hereinafter "Leg. Hist."), reprinted in 3 *U.S. Code Cong. & Admin. News 1972*, p. 4699; S. Rep. No. 92-1125, 92d Cong., 2d Sess., p. 2 (1972), Leg. Hist., p. 64.

[15] H. Rep. No. 92-1441, pp. 10, 12, Leg. Hist., pp. 216, 218; S. Rep. No. 92-1125, pp. 4, 5, 7, 12, 14, 15, 16, (1972), Leg. Hist., pp. 66, 67, 69, 74, 76, 77, 78. *The Report of the National Commission on State Workmen's Compensation Laws* (July 13, 1972), pp. 59 (Para. R3.5), 62 (Para. R.3.8, R.3.9, R3.10), 64-65 (Para. 3.15,

One of the major purposes of the 1972 Amendments was to improve the level of benefits deemed inadequate by all parties. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 73 n.3 (1979). Congress met the perceived need, forthrightly and directly. It raised "benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 262 (1977).

Congress did not broaden the basic "wages" formula for calculating benefits. *Director, OWCP v. Rasmussen*, 440 U.S. 29, 32 (1979). Although it was apparent during the committee hearings that the value of fringe benefits was not considered a part of average weekly wages,[16] the 1972 Amendments did not alter the statutory "wages" definition, 33 U.S.C. § 902(13), and indeed reaffirmed the concept of salary-based "average weekly wages". By requiring the Secretary of Labor to calculate annually a "national average weekly wage", 33 U.S.C. § 906(b)(3), as the yardstick for maximum and minimum benefit levels and for computing annual adjustments in benefits, Congress approved implicitly the continued usage of gross pay as the determinant of "wages".

However, it would be a mistake to assume that Congress failed to consider alternative proposals to change

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R3.16, R3.17). See remarks of Senators Williams and Eagleton, cosponsors of S.2318, immediately before passage, in Leg. Hist., pp. 371, 372, 374-76, 383-84, to the effect that the 1972 Amendments to the LHWCA were designed to implement the National Commission's recommendations.

[16] *See, e.g.*, the testimony of an industry representative, Ralph M. Hartman, a former Director of the Office of Workers' Compensation Programs, Department of Labor, who then indicated that the average weekly wage is calculated without reference to additional weekly employer costs of fringe benefits, then approximately $25.00 per week. Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., pp. 181-182 (1972). See also, *id.*, tables I and II, pp. 98-99.

the traditional approach by utilization of more sophisticated formulae. A major recommendation of the influential National Commission addressed the omission of employer contributions to fringe benefits, coupled with the failure to take into account income taxes. The Commission challenged the traditional, percentage-of-gross wages formula for computing benefits. "The value of a job to a worker cannot be measured simply by his wage or salary." *The Report of the National Commission on State Workmen's Compensation Laws* (July 31, 1972) (hereinafter *"Commission Report"*), p. 54. A better system, it concluded, would "recognize the value of the supplements or fringe benefits which have been introduced since the two-thirds formula was established, and which are not included in gross pay." *Id.*, p. 18. Among these "supplements" identified were "employer contributions to private pension, health, unemployment, and welfare funds." [17]

On the other hand, the *Commission Report* observed that the traditional system tended to overcompensate workers by failing to deduct for income and social security taxes. *Id., pp.* 18, 54-55. Accordingly, as its recommendation R3.1, the *Commission Report* proposed that weekly wages be set at 80% of a worker's "spendable" weekly earnings.[18] The suggested after-tax formula made allowance for fringe benefits by raising the percentage from two-thirds to 80%. It explained:

> Benefits usually are computed as a percentage of gross pay, rather than spendable earnings. Tax fac-

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[17] *Commission Report*, p. 55, table 3.1. Other supplements to wages and salaries included employer payments under the Social Security, federal and state unemployment insurance, railroad retirement and unemployment insurance, compensation for injuries, and a few minor items. *Ibid.*

[18] *Commission Report*, p. 56 (¶ R3.1). The 80% of "spendable weekly earnings" formula would be applicable to benefits for temporary total disability, permanent total disability, and death. *Id.*, pp. 60 (¶ R3.6), 64 (¶ R3.13), 71 (¶ 3.20).

> tors and the number of dependents contribute to inequities in this approach, and the inequities would be compounded if higher benefits were paid. The traditional payments are two-thirds of pretax wages. Benefits calculated as 80 percent of spendable earnings would better reflect the worker's preinjury economic circumstances and cost the system little more. The small increase in cost would in any event recognize the value of the supplements or fringe benefits which have been introduced since the two-thirds formula was established, and which are not included in gross pay. *Id.*, p. 18.

Because "[o]bvious administrative difficulties make this ideal solution impractical," *id.*, p. 56, the Commission alternatively sanctioned the continued use of the "simpler, though generally inferior, formula" of correlating benefits to a percentage of gross weekly wages. *Id.*, p. 57 (¶ R3.2). *See, id.*, pp. 60 (¶ R3.7), 64 (¶ R3.12), 71 (¶ R3.21).

That Congress chose the latter alternative and elected to retain the traditional, simpler approach, is manifest from the face of the LHWCA. The Commission's preferred formula, keyed to "spendable weekly earnings" with a percentage override to factor in "supplements", was a proverbial can of worms which Congress was not prepared to open. None of the bills introduced in the House and Senate sought changes in the "average weekly wages" formula. The basic formula for determining compensation—66⅔% of the employee's average weekly wage—was left unchanged by the 1972 Amendments. *Director, OWCP v. Rasmussen*, 440 U.S. 29, 32, 33 (1979).

By the 1972 Amendments to the LHWCA, Congress dealt with the adequacy of benefit levels in its own fashion. Its design to increase benefits directly by a variety of expedients, without disturbing the basic formula for calculating them, should have been honored below. Congress attached priority to simplicity, ease of

administration, and confinement to "wages" as the standard in 1972, which had not been changed since 1927. *Cf., Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 31 (1978). See *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. at 280. This legislative priority was not open to debate in the Court of Appeals in 1981. The desirability of considering employer contributions to fringe benefits in calculating the average weekly wage, that is whether such contributions "from the viewpoint of social welfare should be counted as part of that legal wage, is not for judicial decision." *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 388-89 (1942). *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. at 284 n.28.

III. THE *HILYER* RULE AS APPLIED INCREASES BENEFITS BEYOND THE LEVEL PERMITTED BY CONGRESS THEREBY UNDERMINING CERTAIN AND PROMPT LHWCA PAYMENTS.

The LHWCA embodies the classic workers' compensation trade-off between certain and prompt benefits for the injured employee and the limitation of the employer's liability according to a wage-based formula that determines monetary benefit levels. *See Murphy v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d 235, 238 (1st Cir. 1976). This cardinal principle of risk-sharing has not been changed in 55 years by any of the many amendments to the Act. Rather, the 1972 Amendments preserved this statutory compromise while directly increasing compensation benefits for covered employees, *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), and minimizing the need for litigation as a means of providing compensation for injured workers. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981).

Congress could have increased benefits by redefining wages to include fringe benefits. Instead Congress preserved the existing definition of wages and

directly raised the maximum and minimum benefits payable under the Act.[19] In recent years, benefit levels have soared beyond reason and may now provide a disincentive to return to work, since claimants can receive benefits that approach or even exceed net earnings.[20] Congress, however, intended to double LHWCA benefits so that 90% of the disabled workers covered under the Act would receive 66⅔% of their average weekly wages.[21] The *Hilyer* redefinition of wages would effectively write this limitation upon benefits out of the LHWCA.

Following the 1972 Amendments, the cost of compensation and medical benefits under the LHWCA dramatically increased 566% between 1973 and 1981 upon payments of $33 million in 1972 to $220 million in 1980.[22] Cash indemnity payments under the 1972 Amendments increased from $37,824,475.04 in 1973 to $189,595,663.98 in 1981, an increase of approximately 400% in less than a decade which is depicted in the Graph in Appendix A.

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[19] Section 6(b)(3) of the LHWCA, as amended in 1972, requires the Secretary of Labor to determine the national average weekly wage (NAWW). The compensation rate is based upon 200% of the NAWW. 33 U.S.C. § 906(b). The rate increase was phased in over a three-year period by raising the maximum benefits from 125% in 1973 to 200% in 1975 of the NAWW. Under the statutory formula, the maximum compensation rate has increased 650% from a $70.00 pre-1972 rate to the present rate of $524.70.

[20] *See Report by the Comptroller General* HRD-82-35 (Apr. 1, 1982) p. 13. (*hereinafter "Comptroller General's Report"*). Under the pre-*Hilyer* definition of wages, compensation paid under the Act equalled 88% of pre-injury take-home pay and high income employees received benefits equalling 96% of take-home pay. The growth of benefit levels approaching after tax spendable income is attributed to the recent growth in taxes.

[21] S. Rep. No. 92-1125, p. 5 (1972), Leg. Hist. (*supra* n.14), p. 67 (1972). *See Director, OWCP v. Rasmussen*, 440 U.S. 35 (1979).

[22] Comptroller General's Report, p. 5.

The post-1972 increase in benefits under the Act subjects self-insured employers to unanticipated tremendous new liabilities. Self-insured employers recently have been shackled with a startling 1,337% increase in cash indemnity payments, from $5.7 million in 1973 to $80.6 million in 1981.[23] An independent study dramatically demonstrates the immediate impact of the 1972 Amendments in which compensation benefits have escalated faster than wages.[24] From 1970-1976, the average shipyard employee's wages increased 8.5% annually while compensation paid under the Act increased by 31.5% annually. Moreover, after the 1972 Amendments, benefits paid to shipyard employees were 256% higher than during the prior three years.[25]

In refusing to sanction a remedy not expressly provided by the LHWCA, this Court stated that the "comprehensive character of the procedures outlined in the Act precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed." *Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S. at 614. The same reasoning requires the reversal of the *Hilyer* decision which, in effect, creates a *new benefit structure* that was considered but not adopted by Congress in 1972.

Self-insured companies in particular will be adversely affected by *Hilyer's* judicial legislation. Self-insurers are already overburdened by massive benefit payouts. An informal survey of the membership of the National Council reveals that the inclusion of fringe benefits into LHWCA wages under *Hilyer* would result in an immediate increase of self-insurers' cash indemnity payments,

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[23] *See* App. D, Letter from Neil A. Montone, Associate Director, Longshore and Harbor Workers' Compensation Programs, Department of Labor.

[24] *See* App. E, Tillinghast, Nelson & Warren, Inc., *A Report on Longshoremen's and Harbor Workers' Compensation Act Experience* October 1978," at p. 23, 24.

[25] *Ibid.*

estimated conservatively between 26 and 38% in 1981 alone, *i.e.* an additional $20 to 30 million in compensation payments by self-insurers as depicted in the Graph in Appendix B.

When all payors under the Act are considered, the *Hilyer* rationale would cost at least an *additional* $50 million to $72 million in 1981. An increase in benefits of this magnitude must not be judicially engrafted onto the LHWCA but rather requires careful and deliberate consideration by Congress of numerous economic and financial factors and, importantly, the effect upon the administration and policies of the Act.

Moreover, implementation of the novel *Hilyer* decision would affect virtually every compensation program in the nation. Professor Larson points out in his authoritative treatise that "[i]n almost every jurisdiction the beginning point in calculating the amount of benefits is the 'average weekly wage'." 2 Larson, *Workmen's Compensation Law*, § 60.11(a) (1981). The Social Security Administration reported that 78.6 million workers were covered by workers' compensation laws during an average month in 1979.[26] The total cost to such employers in 1979 was $20 billion of which claimants received $11.9 billion in benefits, with $1.7 billion being paid by self-insurers. The latest projections indicate that workers' compensation cost employers $22 billion in 1980 and that workers collected $13.3 billion in benefits.[27] The staggering 240% increase in self-insurers compensation costs is depicted in the Graph in Appendix C.

The *Hilyer* decision will increase costs and prevent the efficient administration of the LHWCA contrary to the intent of Congress. First, studies demonstrate that the number of claims filed rise with increases in benefits.[28] Second, *Hilyer* so widens the scope of the LHWCA

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[26] 44 Social Security Bulletin, No. 9 (September, 1981), p. 9.

[27] "Business Insurance", November 8, 1982, p. 55.

[28] *See, e.g., Comptroller General's Report*, p. 14; App. E *Shipbuilders Council Report*, p. 25.

that contested claims will proliferate when the new fringe benefit wage concept is applied to the thousands of LHWCA claims each year, thereby exacerbating the current administrative logjam. The resulting delay and uncertainty in payment of benefits is contrary to the central purpose of the Act, which is a voluntary payment system in which 96% of the claims are resolved without formal adjudication.[29]

Third, the court below obviously did not consider that a myriad of fringe benefit plans are contributed to by employers. Many plans, do not utilize defined contribution funding but employ "defined benefit" funding.[30] Employer contributions to those funds will vary according to actuarial assumptions.[31] The value to a given employee under these various fringe benefit plans will be vigorously disputed, resulting in delayed payment of benefits. For example, Hilyer's union trust fund involved a defined contribution plan. The lower court simplistically and erroneously equated the employer's hourly cost of funding this plan to a tort type concept of replacement of all "value received" by Hilyer. Of course, in workers' compensation law, there is no such concept nor an intent to make claimants whole. Fourth, *Hilyer* authorizes a costly double recovery never contemplated by Congress which permits the survivor to retain the actual fringe benefits purchased by employer contributions, and also to receive an LHWCA death benefit based in part on the "value" of the same contributions. The anomaly of this duplication somehow escaped notice below.

Finally, problems associated with high costs and administrative delay will be further exacerbated if the *Hilyer* rule is applied retroactively through the broad

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[29] *See, Comptroller General's Report*, p. 5.

[30] App. F, Supplemental Agreement Covering Pension Plan, Exhibit A to Agreement between General Motors Corporation and UAW dated March 21, 1982, a defined benefit plan.

[31] *See Alabama Power Co. v. Davis*, 431 U.S. 581, 594 n.18 (1977).

reopening provision of the Act.[32] Thousands of cases are currently subject to reopening. Since a claimant's attorney's fee under the LHWCA depends not upon the amount of recovery but, rather, upon the successful prosecution of a claim, the financial incentive for claimants' attorneys to reopen cases in order to obtain higher benefits would be overpowering. The impact of this probable deluge of petitions for modification would impose additional unanticipated costs upon self-insurers, who are presently under inordinate financial burdens imposed by this expensive legislation. The National Council is also greatly concerned by the intolerable hardship which the *Hilyer* rule will impose on its employees who are entitled to receive prompt determination of their rights, payment of benefits and return to productive lives.

IV. LHWCA "WAGES", IF SUBJECT TO JUDICIAL REDEFINITION AT ALL, SHOULD BE CONSTRUED TO MEAN NET AFTER-TAX WAGES.

Unlike Congress, which gave "the most careful consideration to the recommendations of the National Commission on State Workmen's Compensation Laws", *supra*, p. 16 n.14, the Court of Appeals seemed unaware of the economic distortion resulting from its narrow focus upon the "value" of employer contributions. 670 F.2d at 213. It should have recognized, as did the National Commission, the "inequities" in calculating tax-free benefits on the basis of pre-tax gross wages. *Commission Report*, p. 18. Factoring the cost of fringe benefits into average weekly wages would compound such inequities:

> While workmen's compensation should protect remuneration (earnings plus supplements), it is net remuneration, not total remuneration that is the relevant basis for workmen's compensation benefits.

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[32] *See* 33 U.S.C. § 922 (1979). Compensation benefits for loss of wage earning capacity, permanent total and death benefits are potentially lifetime payments and would always be subject to reopening. 33 U.S.C. §§ 908(a), (c)(21), 909.

> Net remuneration takes account of payroll taxes and job-related expenses incurred by a worker.
>
> * * * Because workmen's compensation benefits are tied to basic wages and salaries, and because the benefits are tax-free, workmen's compensation benefits have tended to become more attractive relative to a worker's spendable earnings. * * * Because the income tax is progressive, tax-free benefits set as a percentage of pre-tax earnings would tend to approach or even surpass post-tax earnings for high wage workers. *Id.*, pp. 54-55.

Like fringe benefits, income taxes were insignificant factors in 1927, when the LHWCA was enacted. Social Security taxes did not even exist. *Commission Report*, p. 55 (table 3.2). That is hardly true today. The gap between gross wages and spendable earnings has widened considerably. Although the tax impact of wages has changed dramatically, the wage-replacement rationale of the LHWCA has not. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 520 n.16 (1981). Congress set a benefit level "commensurate with present day salaries and with the needs of injured workers whose sole support would be payments under the Act." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 262 (1977).

A similar wage-based measure of pecuniary benefits at stake in *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980), prompted this Court to observe:

> * * * The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies. 444 U.S. at 493-94.

While *Liepelt* was an action under the Federal Employers' Liability Act, its focus upon after-tax earnings

embraces a principle of "general applicability" which furthers "strong federal policies of fairness and efficiency in litigation of federal claims." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 487 and n.17 (1981). Lower federal courts have already held that *Liepelt* requires income taxes to be subtracted from wage calculations in LHWCA actions against vessel owners. *Rother v. Interstate and Ocean Transport Co.*, 540 F. Supp. 477, 486 (E.D. Pa. 1982). *See Fanetti v. Hellenic Lines Ltd.*, 678 F.2d 424, 431 (2d Cir. 1982). It is but one step further to hold that *Liepelt* also requires the deduction of income taxes from weekly wages in calculating LHWCA benefits.

That is a step recommended by the National Commission, but not approved by Congress. Nevertheless, if the 1927 "wages" definition may be stretched to cover abstract "values" never contemplated by Congress, surely there can be no barrier to extending *Liepelt* to all wage calculations under the LHWCA. To be sure, such an extension would add to the administrative burdens, delay the processing of claims, retard the delivery of benefits, and make the existing caseload insurmountable. However, affirming *Hilyer* would produce the same consequences. No further harm could result by restoring logical balance to the measurement of wages.

V. IN VIEW OF ERISA'S BROAD COVERAGE, THE LHWCA SHOULD NOT BE CONSTRUED AS IMPOSING ADDED BURDENS ON THE FUNDING OF EMPLOYEE BENEFIT PLANS.

Finally, *Hilyer* is a move in the wrong direction for an additional reason not yet identified by the parties or other *amici*. Not only is its expansion of the "wages" definition unwarranted by the language or history of the LHWCA, but the disastrous financial impact of that decision is matched only by its disruptive intrusion into other major legislative programs.

Somewhat disparagingly, the Court of Appeals thought that employee benefit plans "are no more than a channel"

for providing fringe benefits. 670 F.2d at 211. It was not troubled by the undisputed fact that the benefit plans were created by a collective bargaining agreement in which the employer's payment of contributions was stipulated to constitute a complete discharge of its financial obligations to the plans.[33]

If further reason is needed to demonstrate that such employer contributions are not a proper concern of the LHWCA, the very existence of the Employee's Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA), militates against a judicial extension of the former Act into the domain served by the latter. ERISA regulates the substantive terms of pension plans, setting standards for plan funding and limits on the eligibility requirements an employee must meet. *International Brotherhood v. Daniel*, 439 U.S. 551, 569 (1979). It permits employers and unions to negotiate agreements which define the level and duration of employer contributions to the plans and which limit the employer's financial obligations thereunder. For example, if ERISA was in effect at the time of Hilyer's death,[34] its comprehensive provisions would govern the defined contribution plans here in question, 29 U.S.C. §§ 1002(1), (2), (34), 1003(a).

However, under a *Hilyer* regimen, the LHWCA would disregard all negotiated limitations on employer liability, permitted by ERISA, and impose a new duty to pay benefits in exact proportion to the old and fully-discharged obligation to pay contributions. Because the level of payments are fixed by agreement, 29 U.S.C. § 1002(34), and are thus "identifiable and calculable", in contrast to "de-

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[33] See Laborers District Council Pension and Disability Trust Fund No. 3, March 1972, as amended, pp. 17-18 (contained in Joint Apx. pp. 31-32, filed below).

[34] While ERISA may or may not control disposition of this particular case, *compare Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978), *with Employee Benefits Committee v. Pascoe*, 679 F.2d 1319, 1323 n.5 (9th Cir. 1982), it would be dangerous to ignore its implications.

fined benefit" plans, § 1002(35), participation in a defined contribution plan would thus become a trap for the unwary employer. Once discharged of all financial obligations under ERISA, the employer would incur them again under LHWCA. Since ERISA was designed to promote "a system of private pensions by giving employers avenues for cutting the cost", *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 517, there can be no room for a construction of LHWCA which would provide disincentives and burdens additional to those undertaken contractually. Such an interpretation of one Act at the expense of the other could serve no legitimate purpose. *International Brotherhood v. Daniel*, 439 U.S. at 569-70.

Another aspect of ERISA is implicated. The LHWCA applies to this case only because it was incorporated into the District of Columbia Workmen's Compensation Act. For purposes of ERISA as well as the LHWCA, the DCWCA is a "State" law, 29 U.S.C. §§ 1002 (10), 1144(c)(1); 33 U.S.C. § 902(15), subject to pre-emption under 29 U.S.C. § 1144(a), insofar as it "may now or hereafter relate to any employee benefit plan" covered by ERISA. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 522.

As construed by *Hilyer*, the DCWCA is potentially as vulnerable as the Connecticut statute invalidated in *Stone & Webster Eng. Corp. v. Ilsley*, 518 F. Supp. 1297 (D. Conn. 1981), *aff'd*, —— F.2d —— (2d Cir. 1982). That statute required employers to contribute to employee welfare plans even as to disabled former employees receiving workers' compensation. Because that law added a burden not imposed by private plans, it encroached on the plans and thus, under *Alessi*, was pre-empted by ERISA. *Id.*, —— F.2d —— (slip op., p. 15). *See Dawson v. Whaland*, 529 F. Supp. 626 (D.N.H. 1982).

Similarly, *Hilyer* redirects the contributions from one pocket to another. It dictates that contributions no longer payable to an ERISA plan must now be paid indefinitely,

in the form of benefits, to an ineligible beneficiary under the plan. Here, as in *Ilsley*, the private agreement of the parties to an ERISA plan is upset by an intrusive state law.

> It is of no moment that [such a law] intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation". ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. at 525. *Hilyer* plunges headlong into a gray area of ERISA, giving rise to difficult issues whose resolution is far from clear. That area is being explored in *Delta Air Lines, Inc. v. Kramarsky*, 666 F.2d 21 (2d Cir. 1981), *prob. juris noted*, 102 S. Ct. 1968 (1982). Meanwhile, sound judicial policy indicates a circumspect avoidance of collision with a Congressional program whose contours are still being shaped.

CONCLUSION

For all of the foregoing reasons, the National Council of Self-Insurers submits that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

THOMAS E. CINNAMOND
H. THOMAS HOWELL
RUDOLPH L. ROSE
RICHARD M. BARNES

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10 Light Street
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Counsel for National Council of Self-Insurers, Amicus Curiae

November 18, 1982

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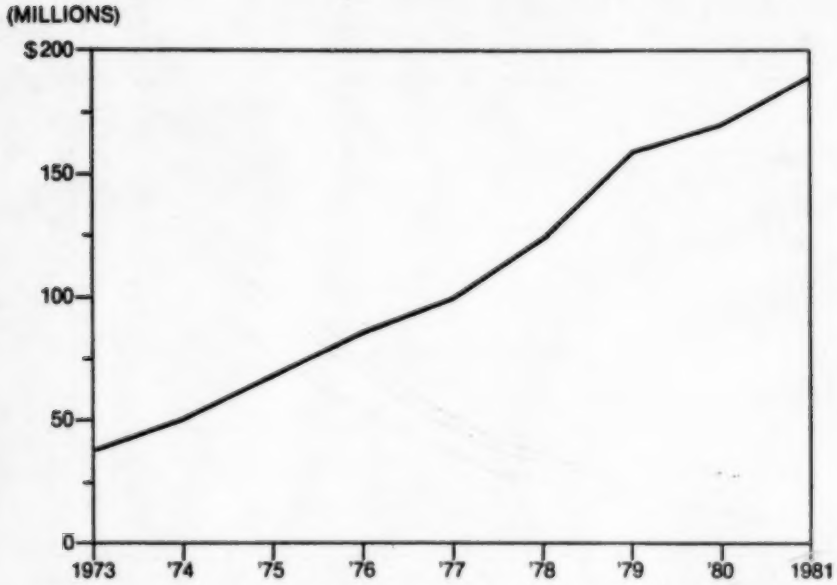
APPENDIX A

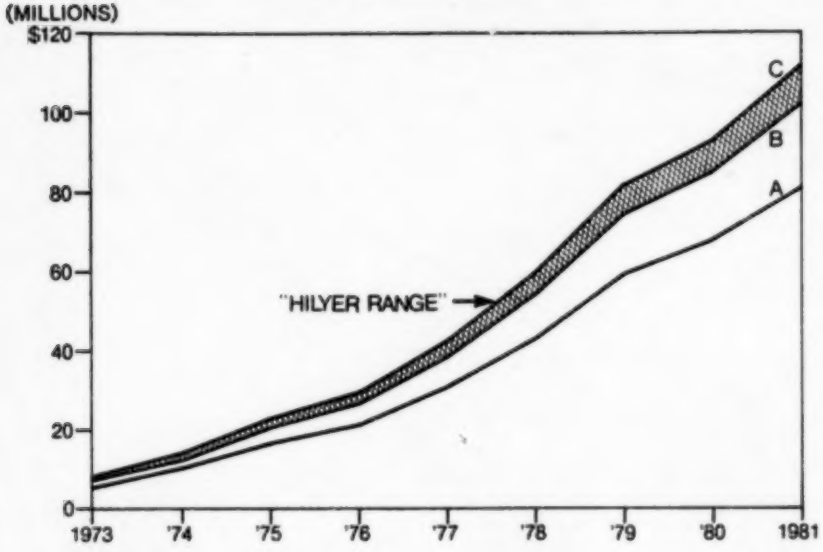
TOTAL WORKERS' COMPENSATION CASH INDEMNITY PAID UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT 1973-1981



Figures computed on actual compensation paid under LHWCA and its extensions, excluding the District of Columbia Workmen's Compensation Act, on a calendar year basis as reported by Employment Standards Administration, Department of Labor. *See* App. D, Letter from Neil A. Montone, Associate Director of Longshore and Harbor Workers' Compensation, Employment Standards Administration, Department of Labor, enclosing Summaries of Compensation Payments by Insurance Carriers and Self Insured Employers under the LHWCA 1973-1981.

APPENDIX B

SELF – INSURERS' WORKERS' COMPENSATION CASH INDEMNITY PAID UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT WITH ESTIMATED "HILYER RANGE" 1973-1981



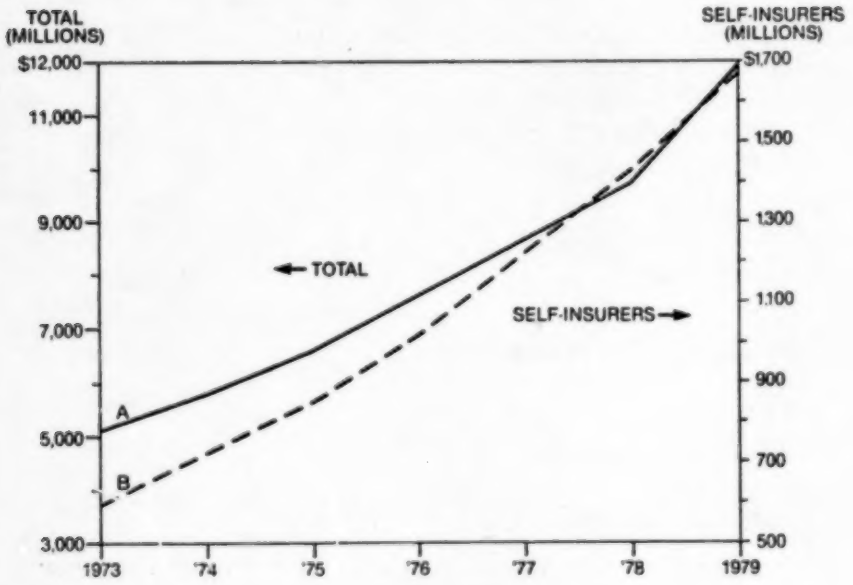
Figures on actual compensation paid under the LHWCA and its extensions excluding the District of Columbia Workmen's Compensation Act (Line "A") computed on a calendar year basis as reported by Employment Standards Administration, Department of Labor. *See* App. D.

Line "A"—reflects the 1,337% increase of compensation payments by self-insurers to claimants under the Act in less than a decade.

Line "B"—represents the "Hilyer Range", *i.e.* an additional 26% and *Line "C"* an additional 38% increase in benefits that would be paid under the Act by self-insurers, according to the National Council survey, if fringe benefits are added to the LHWCA average weekly wage.

APPENDIX C

WORKERS' COMPENSATION PAID IN UNITED STATES 1973-1979



Based upon data published by the Social Security Administration. *See* 44 Social Security Bulletin No. 9, September, 1981; 42 Social Security Bulletin No. 5, May, 1979. Figures include only compensation and medical benefits paid to claimants under state and federal workers' compensation programs.

Line "A"—depicts the 133% increase in total workers' compensation benefits paid under the various state and federal programs in the past nine years and is read along the left axis of the graph.

Line "B"—depicts the 240% increase in benefits paid by self-insurers alone under the various state and federal programs and is read along the right axis of the graph.

Figures for 1977 are not included and are interpolated from the prior and subsequent years.

APPENDIX D

U.S. DEPARTMENT OF LABOR

[SEAL]

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and
Harbor Workers' Compensation
Washington, D.C. 20210

File Number:

Nov. 10, 1982

Mr. Thomas E. Cimmond
Semmes, Bowen & Semmes
10 Light Street
Baltimore, MD 21202

Dear Mr. Cimmond:

In response to your recent inquiries regarding the number of injuries reported under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) Program and the amounts of compensation paid by insurance carriers, self-insured employers, and the Special Fund for the periods 1973 to 1981 under the LHWCA program, I am providing you the following information:

Enclosure 1—the total number of injuries reported under the LHWCA program for the period FY 1973 to FY 1981.

Enclosure 2—the total number of lost-time injuries reported under LHWCA program (lost-time injury is an injury which results in death or loss of time from work beyond the day or shift of work). The lost-time injury count is included in the total injury count in Enclosure 1.

Enclosure 3—a. Summary of compensation payments reported under the LHWCA program, excluding the District of Columbia Compensation Act, by insurance companies and self-insured employers from CY 1973-1981.

b. Summary of compensation payments from the LHWCA Special Fund, excluding the District of Columbia Compensation Act.

Enclosure 4—Summary of compensation payments reported under the LHWCA program, excluding the District of Columbia Compensation Act, by self-insured employers *only* from CY 1973-1981. These amounts are included in the amounts indicated in Enclosure 3a.

If I can provide additional information, please do not hesitate to contact me.

Sincerely,

/s/ Michael E. Condron
NEIL A. MONTONE
Associate Director,
Longshore and Harbor
Workers' Compensation

Enclosures

ENCLOSURE 1

INJURIES REPORTED

Fiscal Year	LHWCA [2]	+	DCCA [3]	=	Total
73	105,384		28,681		134,065
74	113,846		22,486		136,332
75	166,367		31,969		198,336
76 [1]	252,679		38,896		291,575
77	205,584		29,804		235,388
78	217,367		29,184		246,551
79	226,019		31,542		257,561
80	238,274		30,329		268,603
81	250,422		32,475		282,897

[1] Includes FY 1976 transition period from July through September 1976.

[2] Longshoremen's and Harbor Workers' Compensation Act, Defense Base Act, Outer Continental Shelf Lands and Nonappropriated Fund Instrumentalities Act.

[3] District of Columbia Workmen's Compensation Act (Passed 5/17/28).

ENCLOSURE 2

LOST-TIME INJURIES REPORTED

Fiscal Year	LHWCA [2]	+	DCCA [3]	=	Total
73	23,022		7,368		30,390
74	25,669		6,450		32,119
75	37,532		9,267		46,799
76 [1]	50,513		11,967		62,480
77	41,031		10,950		51,981
78	46,628		9,648		56,276
79	56,756		11,886		68,642
80	59,594		10,347		69,941
81	62,713		9,170		71,883

[1] Includes FY 1976 transition period from July through September 1976.

[2] Longshoremen's and Harbor Workers' Compensation Act, Defense Base Act, Outer Continental Shelf Lands Act and Nonappropriated Fund Instrumentalities Act.

[3] District of Columbia Workmen's Compensation Act (Passed 5/17/28).

ENCLOSURE 3a & b

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
Division of Longshoremen's and Harbor Workers' Compensation

Summary of compensation payments reported by insurance companies and self-insured employers.

CY 1973-1981

Longshore Act

1973	$ 37,824,475.04
1974	$ 50,119,640.35
1975	$ 68,123,622.45
1976	$ 86,318,282.62
1977	$ 99,736,761.52
1978	$123,522,575.56
1979	$158,589,795.83
1980	$169,625,502.00
1981	$189,595,663.98

Summary of compensation payments from the LHWCA Special Fund:

Fiscal Years 1973-1981

1973	$ 32,194.00
1974	2,425,357.00
1975	1,979,730.00
1976	3,525,529.00
1977	2,447,054.00
1978	3,133,393.00
1979	5,080,292.00
1980	8,540,009.00
1981	12,490,984.00

ENCLOSURE 4

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
Division of Longshoremen's and Harbor Workers' Compensation

Summary of compensation payments reported by self-insured employers only

CY 1973-1981

	Longshore Act
1973	$ 5,675,888.53
1974	10,068,304.89
1975	16,247,758.98
1976	20,952,490.76
1977	30,428,596.75
1978	42,911,725.39
1979	58,952,891.94
1980	67,231,789.99
1981	80,597,664.75

APPENDIX E

SHIPBUILDERS COUNCIL OF AMERICA

A Report on
Longshoremen's &
Harbor Workers'
Compensation Act Experience
October 1978

TILLINGHAST, NELSON & WARREN, INC.
Actuaries/Consultants

ORIGINS OF THE DATA

TN&W has used data supplied by members of the SCA. The data were not audited, because such an audit would have been beyond the scope of this study.

Some data were gathered by SCA members in response to data requests designed by TN&W. Other data were gathered by SCA members for earlier studies, or drawn from insurance industry sources or United States Government agencies.

TN&W makes no guarantee as to the accuracy of the data used in this study, but we do believe that they are properly assembled.

Most of the analysis in this report is based on combined indemnity and medical payments for claims with $5,000 or more of indemnity. When other SCA member data are presented, the exception is noted.

Data drawn from self-insured SCA members were divided into two categories, with further divisions of each:

1. Fiscal data from general ledger worksheets:
   - Calendar-year claim payments
   - Calendar-year claims incurred

- Number of new claims
- Number of "production and maintenance" employees
- Payrolls for "production and maintenance" employees

2. Claim detail from individual claim files:

- Occurrence date
- Closing date
- Jurisdiction (federal or state)
- Claim payments by calendar year
- Estimates of unpaid liabilities

Claim payments and reserves list indemnity payments and medical payments separately. Claims of the last seven years are subdivided into three categories: fatal, permanent and total disability, and other compensable cases of $5,000 or more.

To the extent possible, TN&W conclusions are based on *payments* rather than on estimates of unpaid liability. Restricting the data base to paid items removes the subjectivity inherent in estimates which result from differing corporate philosophies.

The paid data were arranged by year of occurrence in order to study payment patterns for fixed bodies of claims. These fixed bodies of claims are termed "claim years"; thus all claims occurring in 1970 are combined and are termed "Claim Year 1970."

As a claim year matures—that is, as it gets older—more payments accumulate on those particular claims. Thus the earlier claim years included in the study would have more accumulated payments than would more recent years. By way of illustration: As of December 31, 1976, Claim Year 1975 would be considered 24 months old. On the same date, Claim Year 1976 would be 12 months old. And so on.

TABLE 1.

General Ledger Data

Fiscal Year	Number of Production and Maintenance Employees	Production and Maintenance Payroll (000)	Workers' Compensation Benefits Paid (000)	Number of New Cases
(1)	(2)	(3)	(4)	(5)
1970	20,595	$151,711	$2,025	3,338
1971	18,446	145,436	2,169	3,165
1972	17,417	146,930	2,284	3,298
1973	17,380	158,345	2,999	3,051
1974	15,324	160,384	4,181	2,761
1975	17,086	184,032	6,211	3,360
1976	15,872	189,486	7,309	4,884

Source: Shipbuilders Council of America

The figures in Column (2) represent the full complement of production and maintenance employees of the five shipyards which participated in this survey.

The figures in Column (4) represent all payments made in a particular fiscal year for claims which occurred in that year and in earlier years.

TABLE 2.

All Reported Cases
SCA Data

Claim Year	Number of Claims	Claim Payments to 12/31/76	Claim Year Age in Months @ 12/31/76
(1)	(2)	(3)	(4)
1970	59	$ 776,195	84
1971	63	828,264	72
1972	95	1,157,[illegible]5	60
1973	141	1,596,951	48
1974	199	1,808,588	36
1975	148	1,187,051	24
1976	147	541,114	12
7 years	852	$7,895,498	

The paid data were projected by formulas to 84 months' payout costs for each claim year. As of December 31, 1976, Claim Year 1970 was 84 months mature. Claim Year 1971 was 72 months mature, and was developed to 84 months. Claim Year 1972 was 60 months mature, and was developed to 72 and 84 months, and so forth. Claim Year 1976 was only 12 months mature as of December 31, 1976, and therefore was developed to 24, 36, 48, 60, 72, and 84 months. The data obtained from the participating shipyards, arranged in order of claim year, are shown in Table 2.

Table 3 shows the actual SCA data and TN&W development to a uniform 84 months for each claim year.

* * * *

1. The rate of increase in compensation costs (per employee) is several times the increase in payroll.

TABLE 4.
Payroll Increases vs. Workers' Compensation Cost Increases

Claim Year	Payroll Per Employee	Compounded Increase	Workers' Compensation Benefits Per Employee	Compounded Increase
(1)	(2)	(3)	(4)	(5)
1970	$ 7,366	Base	$118.00	Base
1971	7,884	7.0%	186.42	58.0%
1972	8,436	14.5	258.95	119.4
1973	9,111	23.7	318.40	169.8
1974	10,466	42.1	452.72	283.7
1975	10,771	46.2	442.60	275.1
1976	11,938	62.1	710.44	502.1
7-Year Average		8.5%		31.5%

Source:

Column (2): Table 1, Column (3) ÷ Column (2)
Column (4): Appendix 1, Column (10)

Over the seven-year period 1970-1976, increases in payroll per employee averaged 8.5% per year; increases in workers' compensation benefits per employee averaged 31.5%. The compounded increase in benefits per employee is 808.5% greater than the compounded increase in payroll (502.1%÷62.1%).

2. After 1972, benefits were 256.2% higher than in the period 1970-1972, and were increasing at 165.4% the rate of pre-1973 benefits.

The benefit costs shown on Table 4 were split into two time periods: 1970 through 1972 and 1973 through 1976. A comparison of the two periods shows that the earlier (1970-1972) period was characterized by modest levels and increases, while the later (1973-1976) period was characterized by high levels and large increases. Table 5 is a summary of average cost per employee from Table 4.

TABLE 5.

Workers' Compensation Cost Averages and Increase Rates Before and After the November 1972 Revision (Average Cost Per Employee)

	Workers' Compensation Benefits Per Employee	Annual Increase In Per-Employee Benefit Cost
	(1)	(2)
1970-1972 Average	$187.79	$ 70.48
1973-1976 Average	481.04	116.60
Percentage Change	256.2%	165.4%

Source: Table 4

3. The liberality of the LHW Act is encouraging misuse of benefits.

When employment is high in the shipyards, LHW Act costs are below average; when employment is low, the costs are above average. This suggests a tendency to

TABLE 6.

Employment and Workers' Compensation Costs
SCA Data

Claim Year	Number of Employees	Workers' Compensation Costs
(1)	(2)	(3)
1970	20,595	$ 2,430,210
1971	18,446	3,438,703
1972	17,417	4,510,132
1973	17,380	5,533,792
1974	15,324	6,937,481
1975	17,086	7,562,264
1976	15,872	11,276,104

Source: Appendix 1

misuse LHW Act benefits to provide a distorted form of unemployment insurance. Misuse is common under present-day workers' compensation laws, and appears to have been growing in magnitude since 1972. The phenomenon is best revealed by examining employment levels and workers' compensation costs, as set out in Table 6 below.

There is a very dependable relationship between a *decreasing* workforce and *increasing* benefits. And, when the workforce increases, benefits tend to increase at slower rates. For example, when employment increased in 1975, the increase in benefits was the smallest in the seven-year sample. In contrast, when employment decreased in 1976, benefit estimates rose to record levels. Workers' compensation benefits appear to be misused as a substitute for unemployment benefits.

APPENDIX F

Supplemental
Agreement

Covering

PENSION PLAN

Exhibit A

to

AGREEMENT

between

GENERAL MOTORS CORPORATION

and

UAW

dated

March 21, 1982

* * * *

In the event that the Plan is disapproved by either the Board of Directors or the Stockholders of the Corporation, the Corporation within thirty days after any such disapproval will give written notice thereof to the Union and this agreement shall thereupon have no force or effect. In that event the matters covered by this agreement shall be the subject of further negotiation between the Corporation and the Union. In addition, if the trustee has paid any excess amounts referred to in the paragraph immediately above prior to any such disapproval by the Stockholders of the Corporation, the Corporation will reimburse the trustee for the full amount of such payments.

Section 2. Financing

(a) A trustee or an insurance company, or both, shall be designated by the Corporation, and a trust agreement

or contract, or both, executed between the Corporation and such trustee or insurance company, or both, under the terms of which a pension fund or insured fund, shall be established to receive and hold contributions payable by the Corporation, interest, and other income, and to pay the pensions and supplements provided by the Plan.

(b) Subject to the provisions of Section 2(d) with respect to the funding of early retirement and interim supplements, the Corporation agrees to pay over irrevocably to the trustee or insurance company during the period of this agreement, contributions or payments for the Plan equal to the sum of (i) and (ii) below as determined and certified as of each anniversary of the effective date of the Plan by one or more actuaries chosen by, but independent of, the Corporation, and qualified through Fellowship in the Society of Actuaries (hereinafter referred to as the actuary). Such contributions or payments for any year may be made not later than the date on which such contributions are required by law to be made for the purpose of crediting such contributions to such year under the minimum funding standards of the Employee Retirement Income Security Act of 1974:

(i) the annual "current service" or "normal cost" contribution attributable to a year's cost accruals in respect of assumed continuous service after each such anniversary date, and

(ii) the "prior service contribution" computed as that part of the present value, at each such anniversary date, of the prospective pensions payable under the Plan for employes, pensioners and former employes who are entitled to a deferred pension then covered by the Plan which is in excess of:

(aa) the value of the trust fund, as then comprised of any contracts and total other assets, invested and uninvested, such total assets being valued on a basis at least equal to the total cost thereof, plus

(bb) the then present value of the prospective "current service" or "normal cost" contributions determined by the actuary in accordance with (i) above,

such excess part being amortized according to the following schedule:

(1) in respect of the portion of such excess part attributable to the level of benefits in effect prior to October 1, 1979—the fifty-ninth anniversary of the Corporation's pension plan (October 1, 2009), and

(2) in respect to the portion of such excess part attributable to the increase in the level of benefits established by amendments to the Corporation's pension plan effective on or after October 1, 1979—the thirtieth anniversary of the date on which such increase in the level of benefits becomes effective.

(c) The Corporation may contribute or pay additional amounts to the trustee or insurance company, or both, under (b) above in any year without such additional amounts being construed to reduce any thirty-year period for the completion of the "prior service contributions" of subsection (b) (ii) above. If the Corporation has contributed any such additional amounts prior to any anniversary date of the Corporation's pension plan or shall contribute any such additional amounts prior to any anniversary date of the Plan falling within the duration of this agreement, the Corporation may as of such anniversary, contribute a lesser amount than otherwise determined by (b) above for such anniversary, provided that the value of any contracts and total other assets as valued in accordance with (b) (ii) (aa) above at such anniversary, shall not be less than the amount estimated by the actuary to be the value as if contributions and payments up to and including such anniversary date had been made as provided in (b) above and no additional amounts had been contributed or paid prior to such anniversary.

(d) The Corporation will pay to the trustee or insurance company as of each anniversary of the Plan during the period of this agreement, supplemental contributions or payments to fund the cost of the early retirement and interim supplements of the Plan on a basis approved by the actuary, provided that as of each anniversary the balance in the fund attributable to such supplements shall not be less than zero. If the basis of funding such supplements is not the same as that provided for in Section 2(b), then Section 2(b) and the report and the statement covered by Section 3(a)(5)(iii) and (v) shall exclude any amounts attributable to such supplements.

(e) The Corporation by payment of the contributions or amounts as hereinbefore provided in this section shall be relieved of any further liability, and pensions and supplements shall be payable only from the trust fund or the insured fund or both.

(f) The Corporation may charge to the fund certain expenses necessary for the proper administration of the Plan as follows:

(i) fees for trustee banks and investment advisors, custodian and checkwriting services, and systems and programming services; and

(ii) the direct cost of benefit administration performed by the Corporation for the Hourly-Rate Employes Pension Plan.

Section 3. Administration

(a) Board of Administration

(1) There shall be established a central Board of Administration hereinafter referred to as the Board, composed of six members, three appointed by the Corporation and three by the Union. Each member of the Board shall have an alternate. In the event a member is absent from a meeting of the Board, his alternate may attend

and when in attendance shall exercise the duties of the member. Either the Corporation or the Union at any time may remove a member or alternate appointed by it and may appoint a member or alternate to fill any vacancy among members or alternates appointed by it.

No person shall act as a member of the Board of Administration or as an alternate for such member unless notice of his appointment has been given in writing by the party making the appointment to the other party.

(2) The Board shall meet at such times and for such periods for the transaction of necessary business as may be mutually agreed upon by its members.

* * * *

Employee Retirement Income Security Act of 1974 or regulations thereunder (excluding an investment manager who is an employe of the Corporation); may modify any such trust agreement from time to time accomplish the purposes of this Plan; may remove any trustee, and select any successor trustee; and select and change insurance companies.

Section 2. Contributions

(a) The Corporation, subject to Article IX, Section 1, shall make such contributions to the trustee or pay such premiums under any insured contract for the purposes of providing pensions and supplements under the Plan as shall be required under accepted actuarial principles and Title I of the Employee Retirement Income Security Act of 1974 to maintain the Plan and pension or insured fund in a sound condition and shall pay for expenses incident to the operation and management of the Plan.

(b) No employee shall be required to make any contributions to the Plan.

Section 3. Irrevocability

(a) The Corporation shall have no right, title or interest in the contributions made by it to the trustee and no part of the pension or insured fund shall revert to the Corporation, except that after satisfaction of all liabilities of the Plan as set forth in Article IX, such contributions as may have been made by the Corporation as the result of overpayments may revert to the Corporation.

(b) The pension benefits and supplements of the Plan shall be only such as can be provided by the assets of the pension fund or by any insured fund and there shall be no liability or obligation on the part of the Corporation to make any further contributions to the trustee or insurance company in event of * * *

* * * *

MOTION FILED
NOV 17 1982

No. 81-1891

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF THE SHIPBUILDERS COUNCIL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JED L. BABBIN
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QUESTIONS PRESENTED FOR REVIEW AND LIST OF PARTIES

Amicus Curiae Shipbuilders Council of America adopts the statement of Questions Presented for Review and the list of parties set forth in Petitioners' brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF OF THE SHIPBUILDERS COUNCIL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Shipbuilders Council of America ("Council"), the national trade association of the shipbuilding and ship-repairing industry in the United States, hereby requests leave to file the attached brief *amicus curiae* in support of petitioners Morrison-Knudsen Construction Company and Argonaut Insurance Company. The Council has re-

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ceived written consent from petitioners and from the Director, Office of Workers' Compensation Programs, for the filing of this brief. Respondent Hilyer has declined to consent to the filing of this brief.

A. Nature of the Shipbuilders Council's Interest

The Council is a trade association composed of 22 companies engaged in shipbuilding and shiprepairing in the United States. A list of the members of the Shipbuilders Council is annexed hereto as the Appendix. In each shipyard, many, if not most, of the employees are covered under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). A failure of this Court to overturn the decision below will have a catastrophic economic effect on the shipbuilding industry.

B. Background

At issue below was the question of whether, in computing a deceased employee's "wages", fringe benefits paid by the employer to union funds should be included, thus raising the amount of benefits due to the decedent's estate.

At trial and upon appeal, petitioners argued that the definition of the term "wages" under the LHWCA did not include such fringe benefits. Both the Administrative Law Judge and the Benefits Review Board accepted petitioners' arguments based upon a 54 year old interpretation of the Act. In its opinion entered on December 1, 1981, the United States Court of Appeals for the District of Columbia Circuit reversed these rulings and held that the definition of the term "wages" encompassed payments of identifiable value, including fringe benefits, that were paid for the benefit of the employee at the time of the injury. The Court of Appeals stated that the Act is remedial and that the court believed it was obliged to construe it liberally, resolving doubts in favor of the claimant. The case before this Court is one of first impression.

C. This Case Presents a Question of Law of Vital Concern to the Shipbuilding Industry

Since 1927, when the LHWCA was first enacted, many of the employees of the members of the Council have been covered by that Act. Since the 1972 amendments, virtually all of the employees in each of the shipyards are now covered. Hundreds of shipyard workers have been injured and have been paid workers' compensation for their injuries under the LHWCA. Since long before 1972, shipyard workers have been entitled to fringe benefits of many types under their contracts of employment. The amounts, or even percentages of the employees' wages, which were reflected in fringe benefits are not now entirely determinable.

If the judgment of the Court of Appeals is not reversed by this Court, as the Council believes it should be, the liability of each shipyard, both prospectively for injuries in the future and, perhaps, retroactively for injuries which have already occurred, will be increased, to an undefined degree, by the amount of fringe benefits paid to prior, present, and future employees. For these reasons it is submitted that this Court should consider the arguments and the interests of the Shipbuilders Council which will be affected directly by this Court's decision.

WHEREFORE, the Shipbuilders Council of America prays that the following brief in support of petitioners' be accepted for filing.

Respectfully submitted,

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November 18, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF SHIPBUILDERS COUNCIL OF AMERICA AS AMICUS CURIAE

Amicus curiae Shipbuilders Council of America ("Council") prays that the judgment of the United States Court of Appeals for the District of Columbia be reversed because it has interpreted erroneously the terms of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") 33 U.S.C. §§ 901 *et seq.*, (1976) as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501 *et seq.* (1973).

INTEREST OF THE AMICUS CURIAE

The Council is a national trade association composed of 22 companies engaged in shipbuilding and shiprepairing in the United States. These shipyards employ approximately 112,000 people across the nation. Most of these employees are covered by the LHWCA. Further, each shipyard provides fringe benefits directly to each employee or indirectly through payments to a variety of trust funds. Should the Court fail to overturn the judgment below, the shipbuilding industry will suffer an immediate major change to its liability under the LHWCA. Most shipbuilders are self-insured due to the present variable annual escalation of benefits under LHWCA which precludes forecasting of economic risk. Their present economic exposure, for claims which have already been adjudicated, will be clouded since courts could permit claimants to seek modification of their awards on the basis of a claim for fringe benefits paid at the time of the injury or death even if it had occurred years ago. The liability for future claims will rise in an uncertain manner, depending upon the amount and type of fringe benefits paid under union agreements. These severe consequences would be the result of a decision which overturns 54 years of congressional approval of industry and Government's interpretation of the Act.

STATEMENT OF THE CASE

The Court has before it three cases, all of which involved the same claimant and the same legal issues, and which were consolidated on appeal in the United States Court of Appeals for the District of Columbia Circuit. These three cases all arose as a result of the death in April 1973 of James H. Hilyer during his employment by petitioner Morrison-Knudsen Construction Company ("Morrison-Knudsen"). The workers' compensation statute covering Hilyer at the time of his death was the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501 *et seq.* (1973), which incorporated provisions of the LHWCA.

At the time of his death, Hilyer was a member of Local 456 of the Laborers District Council of Washington, D.C. and vicinity, an AFL-CIO affiliate. In addition to the covered employees' hourly rates paid, the collective bargaining agreement between the union and Morrison-Knudsen provided that the company would pay fixed sums of money into three union trust funds. Specifically, the company agreed to pay 28 cents into the health and welfare fund, 35 cents into the pension funds, and five cents into the training fund, for each hour that each employee worked.

Morrison-Knudsen began paying death benefits under the LHWCA to respondent Sonia Hilyer immediately upon her husband's death. A dispute arose over the amount of the benefits to which she was entitled. Respondent Sonia Hilyer contended, *inter alia*, that the company's contributions to the three union trust funds should be regarded as part of her husband's "average weekly wage" under the LHWCA. Under Section 9(e) of the LHWCA death benefits are computed by reference to the "average weekly wage" of the deceased employee, determind on an annual basis. In proceedings before both the Department of Labor Administrative Law Judge and the Benefits Review Board, it was determined that the employer's trust fund contributions should not be included in the determination of the decedent's average weekly wage and thus the benefits payable to his surviving spouse.

Respondent Sonia Hilyer appealed the ruling of the Benefits Review Board to the United States Court of Appeals for the District of Columbia Circuit. On December 1, 1981, the Court of Appeals reversed the Benefits Review Board and held that because payments to the union trust funds were "readily identifiable and calculable" and were of substantial economic benefits to the employee, they should be included in determining decedent's "average weekly wage" and, thus, benefits to which the surviving spouse is entitled. This was the first time since the LHWCA was enacted in 1927 that any court had deter-

mined that such fringe benefits should be included in the determination of "wages" under the Act.

ARGUMENT

The case before the Court is one of first impresssion. Since the LHWCA was enacted in 1927, no court has held that fringe benefits paid to employees should be included in the calculation of an employee's wages for the purposes of determining what benefits the employees or their surviving spouses would be entitled to under the LHWCA. The Department of Labor long ago adopted the view that fringe benefits are not included in wages in determining LHWCA benefits. Moreover, and most importantly, the Congress has never moved to amend the LHWCA to reverse these longstanding judicial and administrative interpretations.

The 1972 amendments to the LHWCA provided for annual escalation of benefits based upon an annual determination of the national average weekly wage. This uncertain annual escalation has resulted in an inability of virtually all shipbuilders to obtain workers' compensation insurance for workers covered by the LHWCA.

The shipbuilding industry is one of two industries which are the principal employers of persons covered by the LHWCA. Since 1972, the shipbuilding industry has seen the cost of benefits under the LHWCA grow by about 850%. Under the 1972 amendments to the Act, jurisdiction was both expanded and muddled. This has brought about an economic situation which can only be described as untenable.

A. The Prospective Effect of the Hilyer Decision Would Be Enormous.

At present there are approximately 112,000 employees engaged in shipbuilding and shiprepair in the United States and employed by members of the Council. The average hourly wage of those employees is approximately $9.00

per hour. When the Court of Appeals decision was announced, the Council conducted a survey of a representative sample of its membership to determine the probable effect of this decision. The result is staggering. The average fringe benefits paid in the shipbuilding industry are valued at 36.7% of total hourly wages paid varying from a low of 21.5% to a high of 73.3% among the different shipyards.

If the Court of Appeals decision is affirmed, the amount of reserves maintained for workers' compensation by the shipyards as self-insurers will have to be increased accordingly. This will, of necessity, be accompanied by a concomitant reduction in the amount of funds available for capital improvement and growth.

If the decision below is affirmed, each shipyard will be unable to determine whether a court will include, in benefits payable under LHWCA, some or all of the fringe benefits it pays to its employees. It is unusual for a shipyard to have only one union agreement with its employees. Frequently there are several unions representing ten or more separate bargaining units in a shipyard. A shipyard thus may have ten separate schedules of fringe benefits of varied type and value for its employees. Many fringe benefits do not have a dollar figure attached to them. Moreover, the value of some fringe benefits may be subject to varying interpretations of the employment contract.

The additional question of determining which fringe benefits are to be included in LHWCA payments will cause considerable confusion among employers. The most likely result would be a tremendous increase in the number of contested cases, delaying the payment of some benefits to injured workers and their families. This would be directly in contravention of Congress's intent in enacting the LHWCA.

B. The Potential Retroactive Effect of the Court of Appeals Decision is Incalculable.

LHWCA specifically permits beneficiaries to reopen any case for compensation at any time up to one year after the last payment is made based on a mistake of fact 33 U.S.C. §§ 922 (1976). In the event that the Court of Appeals' decision stands, each beneficiary who is receiving benefits, as well as those whose entitlement has expired recently, may be entitled to reopen their cases and seek the inclusion of fringe benefits in their compensation payments, plus interest, going back to the date of the injury, regardless of how long ago the injury occurred.

In October 1978, the Council received the report of a study it commissioned by the firm of Tillinghast, Nelson, and Warren on the subject of LHWCA costs since the 1972 amendments. That report showed between 1970 and 1976, 23,857 new cases were filed under the LHWCA by shipyard employees. The average number of new cases per year came to just over 3,400. The Benefits Review Board is already having great difficulty in handling its present caseload. If the rationale of the court below is affirmed, the wave of petitions to reopen old cases, and the resulting appeals, could result in a delay of years in Board proceedings.

The principal purpose of workers' compensation is to provide prompt and adequate determination of benefits entitlement without long and costly litigation, and with certainty as to the employer's liability. We submit that the decision of the Court of Appeals will have precisely the opposite effect. Despite the fact that the issue in this case is one of *law* and not one of *fact*, claimants and the lower courts will certainly find a way to apply this decision retroactively. An affirmance will simply result in the relitigation of hundreds, if not thousands, of cases which have already been decided, at untold cost to claimants and employers.

C. The Court Should Give Great Weight to the Consistent Interpretation of the LHWCA by the Department of Labor.

As is well demonstrated by the Petitioner's brief, the United States Department of Labor, which is charged with the responsibility of administering the LHWCA, has never included fringe benefits in the determination of wages under the Act. *See* United States Department of Labor, Wage and Labor Standards Administration, Bureau of Employees' Compensation, *LS/HW Program Memorandum, No.* 32 (June 17, 1968). This Court has always held that a long-term uniform administrative interpretation of a statute by the agency responsible for administering it is entitled to great weight. *United States* v. *Rutherford*, 442 U.S. 544, 553-554 (1979). Such deference is particularly appropriate where, as here, the agency interpretation has received *sub silentio* approval by Congress. In 1972 Congress amended numerous parts of the LHWCA but left untouched the definiiton of a worker's average weekly wage and thus the Department of Labors' interpretation of the term.

This Court has also held consistently that administrative interpretations which have been substantially relied on in the formulation of dependent economic practices should "not be disturbed except for cogent reasons". *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921). See also *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), and *Saxbe v. Bustos*, 419 U.S. 65 (1974). The consistent intepretation by the Department of Labor should not be disturbed because of the substantial reliance on it by employers who have paid benefits, purchased insurance, and established self-insurance reserves predicated upon it.

The economic interests of employers who have paid benefits to workers since 1927 are considerable. These employers have relied on the Department of Labor's interpretation of the Act and have not included in the cal-

culation of LHWCA benefits the amount of fringe benefits paid to the employees' union. To reverse this interpretation judicially would place such a substantial additional burden on employers that some could literally be overwhelmed by it.

The effect of this decision on the employers, the insurers, the Labor Department, and the employees themselves will be substantial and chaotic. Where the administrative interpretation is well-founded and consistent, where the new judicial interpretation would have such a catastrophic effect, and where the Act would be virtually impossible for the Department of Labor to administer, the Council submits that there are no cogent or compelling reasons to overturn the prior administrative interpretation of the Act.

CONCLUSION

Amicus curiae Shipbuilders Council respectfully submits that the Court of Appeals decision is founded upon an entirely new and incorrect interpretation of the LHWCA. Had it been the intention of the Congress to include fringe benefits within the term "wages" under the Act, it would certainly have acted to overturn the Department of Labor's consistent administrative determination at some time in the last 54 years. It has not done so. Is is submitted that it has not done so because the Department of Labor's intepretation is correct. For that reason the Council prays that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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November 18, 1982

APPENDIX

Shipyard Members of the Shipbuilders Council of America

Alabama Dry Dock & Shipbuilding Co.
Mobile, AL

The American Shipbuilding Co.
Tampa, FL

Avondale Shipyards, Inc.
New Orleans, LA

Bath Iron Works Corp.
Bath, ME

Bay Shipbuilding Corp.
Sturgeon Bay, WI

Bethlehem Steel Corp.
Bethlehem, PA

Coastal Dry Dock & Repair Corp.
Brooklyn, NY

General Dynamics Corp.
St. Louis, MO

General Ship Corporation
East Boston, MA

Ingalls Shipbuilding Division
Litton Industries
Pascagoula, MS

Jacksonville Shipyards, Inc.
Jacksonville, FL

Lockheed Shipbuilding & Construction Co.
Seattle, WA

Marine Power & Equipment Co., Inc.
Seattle, WA

Marinette Marine Corp.
Marinette, WI

Maryland Shipbuilding & Drydock Co.
Baltimore, MD

National Steel & Shipbuilding Co.
San Diego, CA

Newport News Shipbuilding & Dry Dock Co.
Newport News, VA

Norfolk Shipbuilding & Drydock Corp.
Norfolk, VA

Savannah Shipyard Co.
Savannah, GA

Southwest Marine, Inc.
San Diego, CA

Todd Shipyards Corp.
New York, NY

Tracor Marine, Inc.
Port Everglades, FL

No. 81-1891-CFX	TITLE	Morrison-Knudsen Construction Company, et al., Petitioners v. Director, Office of Workers' Compensation, United State Department of Labor, et al.
DOCKETED Apr. 13, 1982	COURT	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: E. Barrett Prettyman, Jr.
	Counsel for Respondents: Solicitor General, George S. Leonard
Apr. 13, 1982	Petition for writ of certiorari filed.
May 7, 1982	Order extending time for respondent Hilyer to file a response to the petition until May 25, 1982.
May 12, 1982	Motion of American Insurance Association for leave to file a brief as amicus curiae filed.
May 13, 1982	Motion of Alliance of American Insurers, et al. for leave to file a brief as amici curiae filed.
May 13, 1982	Order extending time to file a response to the petition until June 13, 1982.
May 14, 1982	Motion of National Association of Stevedores for leave to file a brief as amicus curiae filed.
May 24, 1982	Order further extending time for respondent Hilyer to file a response to the petition until June 13, 1982.
June 7, 1982	Order further extending time for respondent Hilyer to file a response to the petition until June 28, 1982.
June 16, 1982	Brief for the Federal Respondent in support of petition filed.
June 22, 1982	Order further extending time for all respondents to file a response to the petition until July 28, 1982.
July 14, 1982	Brief, amicus curiae, of The Metropolitan Washington Council, AFL-CIO filed.
July 28, 1982	Brief of respondent Hilyer in opposition filed.
July 28, 1982	DISTRIBUTED. SL13P1.
Aug. 10, 1982	Supplemental memorandum of the Federal Respondent filed. (D)
Sept. 16, 1982	Reply brief for the petitioners filed. (D).
Sept. 22, 1982	Petitioners' supplemental memorandum filed. (D).
Oct. 4, 1982	The motion of American Insurance Association for leave to file a brief as amicus curiae is GRANTED. The motion of Alliance of American Insurers, et al. for leave to file a brief as amici curiae is GRANTED. The motion of National Association of Stevedores for leave to file a brief as amicus curiae is GRANTED. Petition GRANTED.

Nov. 17, 1982	Motion of The Shipbuilders Council of America for leave to file a brief as amicus curiae filed.
	(Over).

81-1891

Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 18, 1982	Motion for leave to file a brief as amicus curiae of the National Association of Stevedores in support of petitioners filed.
Nov. 18, 1982	Motion for leave to file a brief as amici curiae of Alliance of American Insurers, et al. filed.
Nov. 18, 1982	Joint appendix filed.
Nov. 18, 1982	Brief for the petitioner filed.
Nov. 18, 1982	Motion of American Insurance Association for leave to file amicus curiae brief .
Nov. 18, 1982	Motion of National Council of Self-Insurers for leave to file amicus curiae brief.
Nov. 29, 1982	The motion of Shipbuilders Council of America for leave to file a brief as amicus curiae is GRANTED. The motion of Alliance of American Insurers, et al. for leave to file a brief as amici curiae is GRANTED. The motion of National Association of Stevedores for leave to file a brief as amicus curiae is GRANTED. The motion of National Council of Self-Insurers for leave to file a brief as amicus curiae is GRANTED. The motion of American Insurers Association for leave to file a brief as amicus curiae is GRANTED.
Nov. 26, 1982	Brief for the Federal Respondent filed.
Nov. 26, 1982	Motion of respondent Hilyer for leave to argue one-half hour filed.
Dec. 3, 1982	No action on above motion.
Dec. 2, 1982	Motion of the Solicitor General for divided argument filed.
Dec. 13, 1982	The motion of the Solicitor General for divided argument is GRANTED.
Dec. 17, 1982	Brief of respondent Sonia Hilyer filed.
Jan. 3, 1983	CIRCULATED.
March 11, 1983	Reply brief for petitioners filed. (D).
March 21, 1983	ARGUED.